(14) No. 97-1709

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In The

Supreme Court of the United States

October Term, 1997

KUMHO TIRE COMPANY, LTD., KUMHO U.S.A., INC., and HERCULES TIRE & RUBBER COMPANY, INC.,

Petitioners,

v.

PATRICK CARMICHAEL, AN INDIVIDUAL AND FATHER AND NEXT OF KIN TO PATRICK CARMICHAEL, JR., A MINOR, LUZVIMINDA CARMICHAEL, AN INDIVIDUAL, MOTHER AND NEXT FRIEND OF CARINA HORN, A MINOR, AND ADMINISTRATRIX OF THE ESTATE OF JANICE HORN, CARINA HORN, A MINOR, LEONA CARMICHAEL, SHAMEELA CARMICHAEL, NATIMAH CARMICHAEL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX
VOLUME I, PAGES 1 TO 104

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U.S. District Court
Southern District of Alabama

CIVIL DOCKET FOR CASE #: 93-CV-860

Carmichael, et al v. Samyang Tire, Inc., et al Filed: 10/20/93

Assigned to: Chief Judge Charles R. Butler, Jr. Jury demand:

• • •

10/20/93 1 COMPLAINT filed

• • •

11/29/94 73 ORDER granting [70-1] motion to Approve Pro Ami/Pro Tanto Settlement.

• • •

Judgment is hereby entered in favor of the minor Plaintiff, Shameela against the defendant Ford Motor Company in the amount of 12,500.00.

• • •

11/29/94 74 ORDER granting [72-1] motion to Approve Pro Tanto/Pro Ami Settlement as to Carina Horn.

• • •

Jgm is hereby entered in favor of the minor plaintiff Horn against the dft Ford in the amt of $100,000.00.

• • •

1/29/94 75 ORDER granting [71-1] motion to Approve Pro Ami/Pro Tanto Settlement. Jgm is entered in favor of Plaintiff

Natimah Carmichael against Ford in the amount of $12,500.00.

• • •

1/25/96 115 MOTION by Hercules Tire Co., Kuhmo, U. S. A. for Summary Judgment

1/25/96 116 MEMORANDUM by Hercules Tire Co., Kuhmo, U. S. A. in support of [115-1] motion for Summary Judgment

1/25/96 117 MOTION by Hercules Tire Co., Kuhmo, U. S. A., Kumho & Co., Inc. for Summary Judgment

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2/16/96 126 MEMORANDUM BRIEF IN OPPOSITION TO DEFENDANT'S HERCULES AND KUMHO U.S.A.'S MOTION FOR SUMMARY JUDGMENT by Hercules Tire Co., Kuhmo, U. S. A. in opposition to [115-1] motion for Summary Judgment, with supporting docs. consisting

of Plaintiff's Contested Facts, Uncontested Facts, Exhs. A-D ref. to Judge Butler

2/16/96 127 PLAINTIFF'S RESPONSE TO DEF'S MOTION TO EXCLUDE TESTIMONY OF PLAINTIFF'S EXPERT, DENNIS CARLSON AND PLAINTIFF'S BRIEF IN OPPOSITION TO ALL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT by Patrick Carmichael, Luziminda Carmichael to [117-1] motion for Summary Judgment, with attachments to include Plaintiff's Contested Facts, Uncontested Facts, Exhs. A-F

• • •

3/14/96 – _ Pre-trial conference held

3/14/96 138 PRETRIAL ORDER entered. (signed by Chief Judge Charles R. Butler Jr.)

• • •

4/1/96 139 ORDER GRANTING [117-1] motion for Summary Judgment granting [115-1] motion for Summary Judgment granting [119-1] motion to exclude testimony of pla's expert Dennis Carlson & to conduct evide. 104(a) Hearing (signed by Chief Judge Charles R. Butler Jr.) copies mailed (jal) [Entry date 04/03/96]

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Shameela Carmichael, Natimah Carmichael, Carina Horn (signed by Chief Judge Charles R. Butler Jr.); Judgment EOD: 4/3/96

* * *

4/15/96 142 MOTION by Patrick Carmichael, Luziminda Carmichael for Reconsideration of [140-1] judgment order; referred to Judge Butler 4/22/96.

4/15/96 143 MEMORANDUM by Patrick Carmichael, Luziminda Carmichael in support of [142-1] motion for reconsideration of [140-1] judgment order

* * *

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* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Caption Omitted In Printing]

MOTION OF DEFENDANTS HERCULES AND KUMHO U.S.A. FOR SUMMARY JUDGMENT

Defendants, **HERCULES TIRE & RUBBER CO., INC.** ("Hercules") and **KUMHO U.S.A., INC.** ("Kumho U.S.A."), pursuant to Fed. R. Civ. P. 56, move the court to enter an Order granting summary judgment in their favor in this matter. The pleadings, depositions, and answers to interrogatories on file show that there is no genuine issue as to any material fact and that Hercules and Kumho U.S.A. are entitled to a judgment as a matter of law (a) due to the lack of any evidence of negligence or other wrongdoing by these Defendants and (b) under the defense of lack of causal relation.

In support of this motion, Hercules and Kumho U.S.A. offer and attach hereto the following:

- Response of Defendant Kumho U.S.A., Inc. to Plaintiffs' First Set of Interrogatories and Requests for Production. (Tab A)
- Defendant, Hercules Tire & Rubber Company's Responses to Plaintiffs' interrogatories and Requests for Production. (Tab B)
- Defendant Hercules Tire's Supplemental Response to Plaintiffs' Interrogatories. (Tab C)
- Excerpts from deposition of Plaintiffs' expert, Dennis Carlson. (Tab D)

- Excerpts from deposition of Y. D. Yoon. (Tab E)

- Excerpts from deposition of Chong Ha Kim. (Tab F)

- Excerpts from deposition of James Hurt. (Tab G)

As required by Local Civil Rule 8 of the United States District Court for the Southern District of Alabama, Hercules and Kumho U.S.A. further attach their suggested Determinations of Fact, Conclusions of Law, and Order of Judgment. (Tab H)

/s/ Joseph P. H. Babington
WARREN C. HERLONG, JR.
JOSEPH P. H. BABINGTON

ATTORNEYS FOR
DEFENDANTS,
KUMHO & COMPANY, INC.,
HERCULES TIRE & RUBBER CO.
AND
KUMHO U.S.A., INC.

OF COUNSEL:

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Caption Omitted In Printing]

MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

Defendants **KUMHO & COMPANY, KUMHO U.S.A., INC., and HERCULES TIRE & RUBBER CO., INC.**, pursuant to Fed. R. Civ. P. 56, move the Court to enter an Order granting summary judgment in their favor in this matter. The pleadings, depositions, and answers to interrogatories on file show that there is no genuine issue as to any material fact and that these Defendants are entitled to a judgment as a matter of law because (a) Plaintiffs are unable to prove, the existence of a "defect" in the tire at issue, (b) the record contains no evidence of wantonness, and (c) under Alabama law, Plaintiffs are unable to state a wrongful death claim against these Defendants predicated on breach of warranty.

In support of this motion, Defendants rely on all materials which have been filed or offered in connection with the Motion of All Defendants to exclude Testimony of Plaintiffs' Expert Dennis Carlson and the Motion of Defendant Hercules and Kumho U.S.A. for summary judgment and in addition on the following materials attached hereto.

- Hoffmeister Deposition Excerpts (Tab A).

As required by Local Civil Rule 8 of the United States District Court for the Southern District of Alabama, all Defendants further attached their suggested Determinations

of Fact, Conclusions of Law, and Order of Judgment as to this motion. (Tab B).

/s/ Joseph P. H. Babington
WARREN C. HERLONG, JR.
JOSEPH P. H. BABINGTON

ATTORNEYS FOR
DEFENDANTS,
KUMHO & COMPANY, INC.,
KUMHO U.S.A., INC., and
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[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

PATRICK CARMICHAEL, et al.,	*	CIVIL ACTION
Plaintiffs,	*	NO.: 93-0860-CB-S
	*	
vs.	*	
	*	
SAMYANG TIRES, INC., et al.	*	
	*	
Defendants.	*	

MOTION OF ALL DEFENDANTS TO EXCLUDE TESTIMONY OF PLAINTIFF'S EXPERT DENNIS CARLSON AND TO CONDUCT FED. R. EVID. 104(A) HEARING

Defendants, **KUMHO & COMPANY, INC., KUMHO U.S.A., INC.,** and **HERCULES TIRE & RUBBER CO.,** pursuant to Fed. R. Civ. P. 43, Fed. R. Evid. 104, 403, and 702 *et seq.*, and the standards stated in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), move the Court to enter an Order excluding the opinion testimony of Plaintiff's expert witness, Dennis Carlson, on the grounds (a) Carlson's method of analysis does not satisfy the requirements for admissibility, (b) Carlson's opinions are not based on sufficient evidence so that his opinions amount to nothing more than speculation and conjecture properly excluded from evidence, and (c) the probative value of Carlson's testimony, assuming it is admissible, is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury and is due to be excluded under Fed. R. Evid. 403.

In support of this motion, Defendants offer and submit:

- The deposition testimony of Dennis Carlson in this case (two volumes dated March 7, 1995, and May 15, 1995, respectively, together with copies of all exhibits) (Exhibit A).

- The deposition testimony of Dennis Carlson in another case (*Tillery*) (Exhibit B).

Defendants further move the Court, pursuant to Fed. R. Evid. 104(a) to conduct an evidentiary hearing relating to the issues presented by this motion before the scheduled trial date of April 2, 1996.

/s/ Joseph P. H. Babington
WARREN C. HERLONG, JR.
JOSEPH P. H. BABINGTON

ATTORNEYS FOR
DEFENDANTS,
KUMHO & COMPANY, INC.,
KUMHO U.S.A., INC.,
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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Caption Omitted In Printing]

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF PLAINTIFF'S EXPERT, DENNIS CARLSON AND PLAINTIFF'S BRIEF IN OPPOSITION TO ALL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

* * *

Plaintiff relies on the expert testimony of Dennis Carlson to establish the existence of a "defect" in the product at issue, a Hercules Superior XII, designed and manufactured by Defendants, Kumho and sold by Defendant Hercules. The Defendants assert three grounds for the exclusion of Carlson's testimony, however, each assertion brought by the Defendants is baseless.

There is no basis upon which to exclude this expert's testimony as this is a person that is imminently qualified as an expert through his knowledge, skill, experience, training and education and he has " . . . technical or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." (Fed. Evid. 702).

* * *

The technical aspects of tire manufacturing, the technical terminology used in relation to tire components and the various technical causes of tire failure are subjects that are beyond the understanding of the common lay

juror. An expert's testimony is essential to explain in detail, the various "technical" aspects regarding the tire in question and to help bridge the gap between the everyday use of a tire and the mechanics of tire production and design.

* * *

STATEMENT OF THE FACTS

Carlson (the "expert") is a tire consultant working with George R. Edwards & Associates, Inc. Carlson has received a bachelor of mechanical engineering and a master's degree of science in mechanical engineering from the Georgia Institute of Technology. (See, professional resume of George Carlson, attached as Exhibit "F"). Carlson has worked as a consultant in the areas of analysis of tire failures, tire and pavement adherence characteristics, vehicle handling, vehicular accident reconstruction, and mechanical failure analysis for George R. Edwards, Inc. and S. E. A., Inc.

* * *

There are numerous reasons why a tire will come out of service, however the most common is that the tread simply wears out. (See Carlson depo., p. 201 attached hereto as Exhibit "C", see, also, Carlson depo. pp. 513-514 in the case of *Tillery v. Bridgestone, et al.* which was attached as an exhibit to all Defendants Motion to Exclude Testimony of Expert Carlson).[1] The tires that

[1] Hereafter, references to Mr. Carlson's deposition in the *Tillery* case will simply be referred to as *Tillery* depo. with appropriate references made to correct page numbers.

come out of service or fail before their tread wears out are placed in one of two categories of failure: (1) abuse and (2) defect. (*Tillery* depo. p. 513-516). "Abuse" includes puncture, impact, rough operation, over-deflection (overloading and/or under-inflation), mounting damages, and other operational causes of failure. (See, *Tillery* depo. p. 516). Signs of abuse are evident upon a technical inspection of the tire of which Carlson has done many during his ten years of employment with Michelin, specifically employed for four of those years to conduct tire failure analysis. (See, *Tillery* depo., p. 84). Such signs as "bluing in the sidewalls", holes in the tire with "polishing" around the hole, impact marks on tire or on the shoulder of the tire, abnormal wear on the shoulder of the tire, "sidewall deformations" "radial splits", "rim flange impressions," and "bead grooving" are all technical signs of abuse that can be determined from visual and physical inspections of the tire (physical meaning, but not limited to, turning the tire, pulling away the torn carcass of the tire to inspect the inner structure of the tire, etc.) (See, *Tillery* depo. pp. 93-96, 98, 101-102, 111-122, 522-523).

A "defect" in the tire would exist upon completion of the manufacturing process and would be evidenced by a premature failure under the use in which the tire was designed. (See, *Tillery* depo. p. 547). Determination of the type of defect (i.e., manufacturing or design) is a technical endeavor which rests primarily upon visual inspection of the tire. A review of the Defendants manufacturing records, documents and reports is helpful. (*Tillery* depo. pp. 633-634). Through years of experience and training relating to tire failure, and through similarities in all tires relating to construction and structural

failure, Carlson is more than qualified to make a determination of whether a defect existed in the tire made the basis of the suit. (*Tillery* depo. pp. 50-51).

* * *

ARGUMENT

1. THE EXPERT'S METHODS AND OPINIONS SATISFY THE REQUIREMENTS OF FEDERAL RULES OF EVIDENCE 702.

The admissibility of expert testimony is controlled by Fed. R. Evid. 702. Rule 702 states: If . . . technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

The Defendant relies on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993) as the controlling case which deals with the issue of admissibility of expert testimony. However, *Daubert* dealt specifically and solely with the "standard of admitting expert **scientific** testimony in a federal trial." *Supra* at 2791 (emphasis added). There are three types of knowledge listed in Fed. R. Evid. 702: (1) scientific, (2) technical, or (3) other specialized knowledge. Furthermore, the opinions expressed by experts in *Daubert* were based upon "animal studies, chemical analysis and the unpublished re-analysis" of previously published human statistical studies." *Daubert* at 2790. In contrast, Carlson has based his opinions that a defect existed on his personal, physical and visual examination of the tire itself and not any statistical studies and

reports compiled by an outside source such as in *Daubert*. For a scientific analysis of a product there is reliance on statistical studies conducted by other persons, reports and examinations done by other persons, all of which the expert examines and draws conclusions therefrom. *Daubert* holds that these scientific statistical studies must be accepted by the community and subject to peer review and/or publication. *Daubert* does not apply to a first-hand technical inspection as in this case. A technical analysis involves the product itself and an examination of the product through visual and physical examinations. "Technical" is defined by the same dictionary used by the Supreme Court to define "scientific" in *Daubert* as "having special unusual practical knowledge, especially of a mechanical . . . subject." *Webster's Third New International Dictionary* at 2348 (1986). Therefore, *Daubert* has no application to this expert's testimony as Carlson conducted a "technical analysis based on his own observations of the tire and not a "scientific" analysis like the one described in *Daubert*.

A technical analysis of the tire itself was all that Carlson needed to determine the existence of a defect, therefore satisfying the burden of proof as established in *Sears, Roebuck & Company v. Havenhills Farms, Inc.*, 395 So. 2d 991 (Ala. 1981).

* * *

Carlson's criticism of the tire in this case centers around the quality of the "skim stock." "Skim stock" is an adhesive that bonds the rubber parts of the tire together including, the tread to the outer belt, and the outer belt and inner belt of the tires. Carlson's testimony concerns

what happens to the tire when these adhesions break down and the various technical causes of these breakdowns. Once these adhesions break down, there are separations within the tires. (Carlson depo., pp. 243-257, 277-292). Carlson's opinions are based on his personal examination of the tire and his years of technical experience in the tire industry as stated above. Because of the complex and technical nature of the product and in order to present evidence from which a lay juror may reasonably infer that a defective condition of the product was the cause of the product's failure and the cause of the resultant injury to the Plaintiff, expert testimony is necessary. *Brooks v. Colonial Chevrolet/Buick,* 579 So. 2d 1332 (Ala. 1991) (concerning the technical aspects of car brakes).

* * *

II. CARLSON'S TECHNICAL ANALYSIS WAS APPROPRIATE WHEN VIEWED IN LIGHT OF HIS EDUCATION, TRAINING AND EXPERIENCE.

Tires that come out of service or fail before their tread wears out are placed in one of two categories of failure: Abuse and Defect. The mere failure of the tire never establishes the presumption of the existence of a defect without first going through established procedures in determining if the tire had been abused in any fashion. (Carlson depo., pp. 201-205, 243-260, 277-295, 303-325). If there is a separation within the tire, the first step is to eliminate all factors of abuse. (Carlson depo., pp. 243-251, 255-280, 300-305). Once abuse is eliminated, the next step is to determine how the tire was defective. Therefore, the

technical process for tire failure analysis is that if you can rule out abuse or one of the operating factors that caused separation, then you move to the second category of defect. (Carlson depo., pp. 249-250, 256-257, 303). The way the expert rules out whether there is some abuse or operating condition that caused separation is to look at the physical evidence on the tire. (Carlson depo., pp. 225-233). Once Carlson begins to investigate the possible defect, there are several procedures Carlson follows. First, Carlson conducts a visual inspection of the tire. Just as abuse exudes certain characteristics, so does a defect. This is a technical analysis because Carlson relies on his physical and visual inspection of the tire itself, and not on statistical studies compiled by an outside source. The visual inspection of the tire, after the possibility of abuse has been alleviated, establishes whether or not the tire was defective.[2]

* * *

Although it is not required under existing Alabama law, Carlson's second step is to analyze records pertaining to, but not limited to, the tire's design, manufacturing, and testing to determine the specific nature of the defect, i.e., design or manufacturing. This analysis is based on Carlson's numerous years of technical training

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[2] At this point, the Plaintiff would point out that Mr. Carlson's method of analysis is identical to that of the Defendant's expert, Thomas Dodson. See, pp. 44-47 of Dodson's deposition attached hereto as Exhibit "A". Plaintiff regards the fact that Mr. Dodson's methodology of arriving at his opinions is the same as Mr. Carlsons, as compelling evidence that Defendant's Motion is at best, dilatory and borders the requirements of Federal Rule of Civil Procedure 11 sanctions.

and experience in the tire industry.[3] These documents, together with a visual inspection and the elimination of all signs of abuse, show affirmative evidence of a defect. Carlson believes that his methodology is 95% accurate due to his extensive experience, education and training relating to tire failure. (*Tillery* depo., pp. 37-40, 43).

The Defendant argues that because of the lack of scientific data supporting Carlson's technical analysis, Carlson's conclusions should be suppressed. However, the absence of scientific data supporting an expert's opinion goes to the weight to be accorded testimony and not to its admissibility and should be left for the jury's consideration. *Vitebro v. Dow Chemical Co.*, 826 F. 2d 420, 422 (5th Cir. 1987); *Dickson v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985). Carlson's opinions are based on his technical examination of the subject tire and are not based on any statistical data collected from another source. This is a question of weight to be afforded to his testimony and is not relevant to the testimony's admissibility.

III. THE PROBATIVE VALUE OF CARLSON'S TESTIMONY OUTWEIGHS ANY PREJUDICE THAT HIS TESTIMONY MAY HAVE.

The Defendant bases the argument that Carlson's testimony will be unfairly prejudicial on the lack of evidentiary support for Carlson's technical analysis. However as stated earlier, a lack of scientific data goes merely

---

[3] Again, this is the same method of analysis used and described by the Defendant's expert, Dodson.

to the weight to be afforded the testimony rather than the admissibility of such testimony.

* * *

Carlson's testimony is essential to the jury's understanding of the technical aspects of the tire failure, the technical terminology and the procedures used by manufacturers in designing and manufacturing tires.

* * *

IV. THE RECORD CONTAINS SUBSTANTIAL EVIDENCE THAT A "DEFECT" IN THE TIRE IN QUESTION EXISTED.

V. BECAUSE ALABAMA LAW ONLY REQUIRES A PLAINTIFF TO SHOW THE EXISTENCE OF A DEFECT, NOT THE NATURE OF THE DEFECT, I.E., DESIGN OR MANUFACTURING, CARLSON'S OPINION IS SUBSTANTIAL EVIDENCE.

The law in Alabama provides:

> "[P]roof of the specific defect, i.e., the exact act, omission, process, construction, etc. resulting in the product's failing its intended use is not required. If a product is unreasonably dangerous, it is necessarily defective, and the consumer should not be required to prove defectiveness as a separate matter." *Havenhills Farm*, supra, see, also, *Reynolds*, supra.

The Defendants assert the argument "while Carlson believes there is a design or manufacturing defect – he doesn't know which – in the tire's adhesion system, he admits there is no evidence he can point to of a design

defect and no evidence he can point to of a manufacturing defect." There is simply no requirement upon the Plaintiff to show the existence of a design versus a manufacturing defect. Plaintiff has satisfied his burden of proof by establishing the existence of a defect through Carlson's testimony. The factors relied on by Carlson are thoroughly set out in his affidavit which is attached hereto as Exhibit "F".

In this case, the record contains substantial evidence from which a jury could conclude that the tire in question, separated as a result of a manufacturing defect. The separation in turn caused the tread to "flap", further resulting in a catastrophic loss of air pressure which caused Plaintiff Patrick Carmichael to lose control of the vehicle with a resulting roll over. The record contains substantial evidence of a "defect" as is required by prevailing Alabama law and as such, the Summary Judgment Motion of all Defendants is due to be denied.

Respectfully submitted,

JACKSON, TAYLOR & MARTINO, P.C.
Attorneys for the Plaintiff,

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Caption Omitted In Printing]

PRETRIAL ORDER

There is no contest as to the jurisdiction of this Court or as to the correctness of the named Plaintiffs or the named Defendants.

I. AGREED FACTS

A. On July 6, 1993, a van owned by Plaintiff, Patrick J. Carmichael, was involved in a single-vehicle accident on Interstate 65, at or about milepost 46, in Baldwin County, Alabama.

B. The van was a 1988 Ford Aerostar XL minivan, vehicle identification number 1FHCA1104JZA22111, bearing State of Washington license number 615-BJZ.

C. The occupants of the van at the time of the accident were Patrick J. Carmichael, Leona Carmichael, Shameela Carmichael, Natimah Carmichael, Janice Horn, Carina Horn, Luzviminda Carmichael, and Patrick J. Carmichael, Jr.

D. Patrick J. Carmichael was driving the vehicle at the time of the accident.

E. Leona Carmichael was located in the right front passenger seat at the time of the accident.

F. Shameela Carmichael was located in the left center seat at the time of the accident.

G. Natimah Carmichael was located in the middle center seat at the time of the accident.

H. Janice Horn was located in the right center seat at the time of the accident.

I. Carina Horn was located in the left rear seat at the time of the accident.

J. Luzviminda Carmichael was located in the middle rear seat at the time of the accident.

K. Patrick J. Carmichael, Jr. was located in the right rear seat at the time of the accident.

L. The accident occurred at approximately 8:45 a.m.

M. The four tires located on the van at the time of the accident were:

1. *Right Front:* Sears Radial Guardsman – Response XL.

2. *Left Rear*: Hercules DSR II – Steel Belted Radial.

3. *Right Rear:* Hercules Superior XII – Steel Belted Radial – DOT H2AD YPU 068.

4. *Left Front:* Sears Radial Guardsman – Response XL.

N. At the time of the accident the van was positioned in the right lane of the south bound lanes of traffic on Interstate 65.

O. All of the occupants, with the exception of Patrick Carmichael and Leona Carmichael, were ejected from the van during the accident; specifically, Janice

Horn, Carina Horn, Natimah Carmichael, Shameela Carmichael, Patrick Carmichael, Jr., and Luzviminda Carmichael were ejected.

P. Janice Horn suffered injuries during the accident from which she later died.

Q. The other occupants received personal injuries during the accident.

R. The Hercules Superior XII tire located on the right rear of the vehicle at the time of the accident (hereinafter "the tire") was manufactured by Defendant, Kumho & Company, Inc. ("Kumho & Company"), in the Republic of South Korea in the sixth week of 1988.

S. By transactions that occurred in 1984, Defendant, Samyang Tires, Inc., was merged into Kumho & Company, with Kumho & Company being the surviving corporation.

T. Kumho & Company designed and manufactured the tire.

U. Kumho U.S.A. did not design or manufacture the tire.

V. Defendant, Hercules Tire & Rubber Company, Inc. ("Hercules"), does not design or manufacture tires, but buys and distributes tires designed and made by others.

W. Hercules retained the right to approve the aesthetics or "look" of the tread and markings or lettering placed on the tire, but relied on Kumho & Company with respect to all structural design and manufacturing issues and processes.

X. On January 2, 1988, the van was sold as a new vehicle by Sound Ford to Ms. Fai E. Jones.

Y. In approximately May, 1991, Ms. Fai E. Jones traded the van into Sound Ford, and at that time the mileage on the van was 54,385.

Z. Sound Ford transferred title to the vehicle to Sound Mitsubishi in May, 1991.

AA. On May 25, 1991, Mr. and Mrs. Elpidio Turquiano purchased the vehicle from Sound Mitsubishi, and at that time the mileage on the vehicle was 54,385.

BB. The sale of the van by Sound Mitsubishi to the Turquianos was "as is, no free work."

CC. In approximately March, 1993, the Turquianos traded the van into Tacoma Dodge, and at that time the mileage on the vehicle was approximately 88,860 miles.

DD. On April 30, 1993, Mr. Carmichael purchased the van from Tacoma Dodge, and at that time the mileage on the vehicle was 88,997.

EE. The sale of the van by Tacoma Dodge to Mr. Carmichael was "as is."

FF. At the time of the accident the odometer on the van showed 96,008 miles.

GG. In March of 1991, while the van was owned by Ms. Jones, it was involved in an accident which damaged the front end of the van; the damage to the van was repaired by Sound Ford at a cost of $4,633.88.

HH. In May of 1993, after the van had been purchased by the Carmichaels, the engine on the van was replaced by Tacoma Dodge.

II. The Carmichaels drove the van cross-country from the Seattle, Washington area, starting in late June of 1993, and arriving in the Mobile, Alabama area on July 6, 1993.

JJ. Ford Motor Company has paid the following amounts to Plaintiffs in *pro tanto* settlement of their claims:

1.	Patrick Carmichael:	$200,000
2.	Luzviminda Carmichael:	$150,000
3.	Carina Horn:	$100,000
4.	Leona Carmichael:	$ 25,000
5.	Natimah Carmichael:	$ 12,500
6.	Shameela Carmichael:	$ 12,500

* * *

Patrick CARMICHAEL, et al., Plaintiffs,

v.

SAMYANG TIRES, INC., et al., Defendants.

Civil No. 93-0860-CB-S.

United States District Court,
S.D. Alabama,
Southern Division.

April 1, 1996.

Richard H. Taylor, Steven A. Martino, Sidney W. Jackson, III, Steven A. Martino, Mobile, AL, for plaintiffs.

C. Richard Wilkins, Mobile, AL, for Carina Horn.

Warren C. Herlong, Jr., Joseph P.H. Babington, Mobile, AL, for defendants.

Steven A. Martino, Liason Counsel for the Plaintiffs, Jackson, Taylor & Martino, Mobile, AL, for Leona Carmichael, Shameela Carmichael, Natimah Carmichael.

ORDER

BUTLER, Chief Judge.

This matter is before the Court on a motion for summary judgment filed by all defendants (tab 117); motion for summary judgment filed by defendants Kumho U.S.A., Inc. ("Kumho U.S.A.") and Hercules Tire & Rubber Co., Inc. ("Hercules") (tab 115); and motion of all defendants to exclude testimony of plaintiff's expert Dennis Carlson (tab 119). After careful consideration of the issues raised by the parties in their briefs, the Court finds that the defendants' motion for summary judgment is due to be **GRANTED**.

I. Factual Background

The underlying facts of this products liability action are largely undisputed by the parties. On July 6, 1993, a 1988 Ford Aerostar XL minivan owned and driven by plaintiff Patrick J. Carmichael was involved in a single-vehicle accident while traveling southbound on Interstate 65 in Baldwin County, Alabama. The accident occurred when the right rear tire of the van failed, after which the driver lost control of the vehicle. The van overturned, and six of the eight occupants were ejected from the van. Plaintiffs Patrick Carmichael, Luzviminda Carmichael, Carina Horn, Patrick Carmichael, Jr., Leona Carmichael, Shameela Carmichael, and Natimah Carmichael all suffered injuries as a result of the accident. Janice Horn, the daughter of plaintiff Luzviminda Carmichael, died as a result of her injuries.[1]

This lawsuit revolves around the history of the Carmichaels' minivan and, more precisely, of the right rear tire which was on the minivan at the time of the accident. On April 30, 1993, plaintiff Patrick Carmichael purchased

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[1] There is a dispute as to whether the plaintiffs were wearing seatbelts at the time of the accident, and whether the wearing of seatbelts would have prevented the accident. Additionally, the parties disagree as to whether Patrick Carmichael's reaction to the blowout contributed to the accident, and whether there are actions he could have taken which would have prevented the accident. The speed of the minivan prior to the accident and the causal relationship, if any, between that speed and the plaintiffs' injuries are likewise matters on which the parties advance conflicting positions. For the purposes of this summary judgment motion, these factual disagreements are resolved in the light most favorable to the plaintiffs.

the minivan "as is" from a Dodge dealership in Washington state. At the time of the sale, the van's odometer registered 88,997 miles. The right rear tire on the van at the time of Carmichael's purchase was a Hercules Superior XII Steel Belted Radial, the same tire that failed two months and 7,011 miles later.[2] This tire was designed and manufactured by defendant Kumho & Company ("Kumho") and was produced in the Republic of South Korea in the sixth week of 1988.[3] Though the service history of the tire is unknown, a plaintiffs' witness has stated his opinion that the tire had been driven for thousands of miles prior to failure. The witness further testified that the remaining tread depth on the tire at the time of the accident varied from 0/32" to 3/32", down from an original depth of 10/32" to 11/32". Additionally, the tire had been punctured by a nail or screw at some point during its service life, and the plaintiffs' witness testified that the exterior holes caused by the puncture had not been adequately filled.

The tire was stamped with the name "Hercules" before it left the factory in South Korea. It is undisputed

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[2] The parties' discovery efforts have been unsuccessful in determining when or where this tire was purchased and mounted on the van. Carmichael has testified that the tire was on the van when he bought it, and that he did not replace it prior to the accident; however, it is unclear how long the tire had been on the van or how many miles the tire had traveled before Carmichael acquired the van.

[3] In 1984, defendant Samyang Tires, Inc. ("Samyang") was merged into Kumho. Defendant Kumho was the surviving corporation; thus, Samyang is not an independent corporate entity and is not a separate party to this lawsuit.

that defendant Hercules Tire & Rubber Company, Inc. ("Hercules") did not manufacture or design the tire, although it did retain the right to approve the aesthetics of the lettering, markings, and tread on the tire. Hercules is in the business of buying and distributing tires produced by others. Defendant Kumho U.S.A., Inc. ("Kumho U.S.A."), a separate entity from Kumho, did not participate in either the manufacture or the design of the tire at issue. Kumho U.S.A. is in the business of distributing Kumho's products in the United States. Prior to 1990, Kumho shipped the Hercules tires it produced to one of three recipients: (1) to Kumho U.S.A.; (2) to Hercules; or (3) directly to the customer who was purchasing the tires. The plaintiffs have been able to produce no evidence as to which distribution route was used with respect to the particular tire at issue in this case; hence, there is no evidence that defendants Hercules and Kumho U.S.A. ever handled or sold this tire.

On October 20, 1993, the plaintiffs filed the instant lawsuit in this Court, sitting in diversity jurisdiction. As amended, the complaint sets forth causes of action against the defendants under the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), negligence/wantonness, and breach of warranty. Plaintiffs have retained one expert witness, Dennis Carlson ("Carlson"), to testify as to the presence of a manufacturing or design defect in the right rear tire of the minivan. The defendants have filed two summary judgment motions, as well as a motion to exclude Carlson's testimony under Rule 702 of the Federal Rules of Evidence. The Court has determined that these motions are ripe for disposition,

and that no evidentiary hearings or other proceedings are necessary at this time.

II. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir.1987). A party is entitled to judgment as a matter of law unless the nonmovant demonstrates that a genuine dispute exists as to an element of his case on which he has the burden of proof. *Celotex*, 477 U.S. at 322; *Everett*, 833 F.2d at 1510. A failure by the opposing party to point out disputed facts will be taken as an admission that no material factual dispute exists. Local Rule 8. The function of the court is not to "weigh the evidence and determine the truth of the matter but to determine whether there is an issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Summary judgment is improper "if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. If a reasonable factfinder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment.

Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir.1988). All factual matters are to be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Barnes v. Southwest Forest Industries, Inc.*, 814 F.2d 607, 609 (11th Cir.1987).

III. Legal Analysis

A. Plaintiffs' Claims Under AEMLD

1. Standard and Burdens of Proof

The plaintiffs allege that the Hercules Superior XII tire on the right rear of the van failed because of a manufacturing or design defect. This theory of liability is embodied in the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"). Under Alabama law, in order to prevail on an AEMLD claim, a plaintiff must show the following:

> "(1) [H]e suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if
>
> (a) the seller is in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> "(2) Showing these elements, the plaintiff has proved a prima facie case although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from, or entered into any contractual relation with, the seller."

Casrell v. Altec Industries, Inc., 335 So.2d 128, 132-33 (Ala.1976).

Thus, the AEMLD imposes upon a manufacturer the duty to design and manufacture a product that is reasonably safe for its intended use. *See Townsend v. General Motors Corp.*, 642 So.2d 411, 415 (Ala.1994). However, "[p]roof of an accident or injury is not in itself sufficient to establish liability under the AEMLD; a defect in the product must be affirmatively shown." *Id.; see also Brooks v. Colonial Chevrolet-Buick, Inc.*, 579 So.2d 1328, 1333 (Ala.1991). Ordinarily, expert testimony will be required to prove the existence of a defect in AEMLD cases because of the complex and technical nature of such proof. *See Sears, Roebuck & Co., Inc. v. Haven Hills Farm, Inc.*, 395 So.2d 991, 995 (Ala.1981).

2. Carlson's Testimony

The plaintiffs have presented the testimony of a single witness, Dennis Carlson ("Carlson"), in support of their claim that the tire failure was caused by a manufacturing or design defect. Plaintiffs have offered Carlson as an expert witness, pursuant to Rule 702 of the Federal Rules of Evidence. Carlson is a mechanical engineer employed as a tire consultant by George R. Edwards and Associates, Inc. He has earned a masters degree in mechanical engineering, and has worked as a consultant in the area of tire failure on a number of cases. Additionally, he worked for Michelin America for ten years in

the field of tire design. The defendants challenge Carlson's qualifications to testify on the subject of tire failure and request an opportunity to explore his competency to offer an opinion on the causes of tire failure at a *Daubert*-type evidentiary hearing pursuant to Rule 104(a) of the Federal Rules of Evidence. However, the Court need not rest its ruling on a determination of Carlson's competence to offer an expert opinion on the causes of tire failure.[4] Therefore, the Court will not examine his qualifications in any greater depth at this time, and will assume (without deciding) for the purposes of this order that Carlson is qualified to offer expert testimony on this subject.

Carlson opines that the tire failed because of poor or insufficient adhesion between the rubber, steel, and nylon components of the tire. *See* Carlson Deposition ("Carlson Depo."), at 411. This insufficient adhesion, in turn, caused the tire components to separate from each other, resulting in the flapping of the tread and the sudden, catastrophic loss of air pressure in the tire. Carlson Depo., at 331. Loss of adhesion, according to Carlson, may be caused by either abuse or defect. Carlson Depo., at 243-244. The

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[4] Additionally, the Court notes that the parties have submitted some 520 pages of transcripts of deposition testimony provided by Carlson in this matter, as well as some 670 pages of transcripts of deposition testimony provided by him in another case. The Court has reviewed these documents in some detail, and has determined that no Rule 104(a) evidentiary hearing will be necessary as to the substance of Carlson's proposed trial testimony, the methodology used by Carlson, or the basis for his conclusion that the tire failed due to a manufacturing or design defect.

only form of abuse at issue in the present case is overdeflection, which may occur when a tire is underinflated, overloaded, or both.[5] Carlson Depo., at 217. In order to determine whether a defect has caused the tire failure, Carlson looks for the following signs of overdeflection: (1) greater tread wear on the shoulder than in the center of the tire; (2) sidewall deterioration or discoloration; (3) abnormal bead grooving on the tire; and (4) rim flange impressions. Carlson Depo., at 250-52, 390. When Carlson fails to find sufficient evidence of two of these four indicators in a tire, he rules out overdeflection as a cause of the tire failure and, barring other evidence of abuse, concludes that the loss of adhesion was prompted by a manufacturing or design defect. Carlson Depo., at 278-79. As Carlson testified, "when we look for the indicators of overloading or overdeflection, as I see, and eliminate those as a possible cause, then there is nothing else but a manufacturing defect." Carlson Depo., at 278.

With respect to the tire at issue in this case, Carlson examined it for the first time on the morning that his deposition was taken and performed no tests on any of the minivan's tires at that time.[6] Carlson Depo., at 328.

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[5] Overdeflection causes the tread of a tire to become too hot, causing deterioration in the sidewall, cords, and rim of the tire. Carlson Depo., at 219-221.

[6] This initial observation occurred after Carlson had issued his written report and conclusions regarding the cause of the blowout. The plaintiffs' original expert, George Edwards, had examined the tire previously and had taken photographs of the tire. Later, Carlson replaced Edwards as the plaintiffs' experts, reviewed Edwards' photographs, and adopted Edwards' report and conclusions almost verbatim as his own.

His analysis was limited to a visual inspection of the tire, though he conceded that such actions as cutting the tire could reveal additional pertinent information. Carlson Depo., at 381. Carlson indicated that the separation most likely began under a bald spot on the tire, where the tread was completely worn. Carlson Depo., at 488. In his examination of the tire, Carlson observed some evidence of uneven tread wear, sidewall deterioration, abnormal bead grooving, and rim flange impressions; however, he found that the evidence with respect to each factor was either insufficient to demonstrate overdeflection or that it was attributable to causes other than overdeflection. Carlson Depo., at 403-06, 445-46, 449-56. Based on this testimony, Carlson asserted that there was no evidence of overdeflection in the tire. Carlson Depo., at 462.

After ruling out overdeflection and other forms of abuse, Carlson concluded that the tire failure must have been precipitated by a manufacturing or design defect in the tire. However, neither the plaintiffs' written submissions nor the Court's review of Carlson's voluminous deposition transcripts indicate that Carlson identified any affirmative evidence of a defect in the tire. Stated differently, Carlson's expert opinion that the tire failure was caused by a manufacturing or design defect is founded on his determination that there is a paucity of evidence of overdeflection or other abuse, rather than by his ability to pinpoint any affirmative evidence of a defect.

3. Admissibility of Carlson's Testimony

The defendants' collective motion for summary judgment on the AEMLD claim is rooted in two separate

arguments: (1) Carlson's testimony is inadmissible; and (2) Carlson's testimony contains no evidence that the product failed because of a defective [sic] rather than because of abuse.[7] The Court believes that the first of these arguments provides an adequate basis for granting summary judgment in this case.

The defendants contend that Carlson's testimony is inadmissible as expert testimony under the standard articulated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The *Daubert* case expounded on Rule 702 of the Federal Rules of Evidence, which states that:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, Fed.R.Evid.

In particular, *Daubert* imposed on trial courts a sort of gatekeeper function in accordance with which they must "ensure that any and all scientific testimony or evidence

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[7] The Court rejects the defendants' argument that Carlson's testimony, if admissible, failed to make a prima facie showing that the tire was defective. Carlson's finding of a defect was prompted by his conclusion that insufficient signs of abuse were present, and his belief there can be no causes of tire separation other than abuse and defect. As Carlson colorfully put it in his deposition: "Well, besides nuclear war that's about all there is that causes tire failure." Carlson Depo., at 392. Despite defendants' exhortations to the contrary, the Court perceives no inherent flaw in a process-of-elimination form of proof per se, as long as the underlying methodology is scientifically valid.

admitted is not only relevant, but reliable." *Daubert*, 125 L.Ed.2d at 480. In assessing whether proffered scientific testimony is admissible, a court must consider such factors as: (1) whether the technique or theory used may be tested or refuted; (2) whether the technique or theory has been a subject of peer review or publication; (3) the known or potential rate of error of a technique; and (4) the degree of acceptance of a theory or technique within the relevant scientific community. *Id.* at 482-83. In so doing, the trial court is reminded that "the overarching subject [of a *Daubert* analysis] is the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission." *Id.* at 484.

Regarding the first *Daubert* factor, it appears that Carlson's method for analyzing the tire is not susceptible to testing or falsification. Carlson admits that his work is "subjective" and that there is a certain degree of "uncertainty" in his conclusions.[8] *See* Carlson Depo., at 276-84.

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[8] At one point in Carlson's deposition, the following exchange took place:

> "Q: And if you don't find the abuse factors or the evidence on the abuse factors is inconclusive, then what do you do?
>
> A: Well, then it's probably a bad tire.
>
> Q: Probably a bad tire?
>
> A: Yes. And you got to look and see.
>
> Q: I guess then it all comes down to the subjective opinion of whoever is doing the tire failure

When questioned specifically, he could not identify any specific tests or other procedures which could be used to corroborate or refute the results of his visual inspection of the tire at issue.[9] Carlson Depo., at 276-78; 295- 96; 302, 387-88. Indeed, when asked specifically if there were any chemical tests which he could have applied to this tire, Carlson responded, "I don't think there are any that would apply to this case." Carlson Depo., at 388.

As to the second factor, Carlson concedes that there are no publications or papers which have approved or

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analysis as to whether those factors of abuse you've listed . . . exist in a given tire?

A: Well, it's subjective if you have the knowledge and experience to analyze those factors." Carlson Depo., at 402.

[9] Carlson does identify a number of tests which could be used to determine the adhesion of a particular tire. However, he states that he was unable to perform such tests on this tire for the following reasons:

"Q: Are there any tests of adhesion that you can use after a tire failure?

A: After a tire failure there are none that I would use.

Q: And why wouldn't you use them?

A: Well, I think that after a tire has been through an accident scenario or something like that that it gives you rather dubious results.

Q: It would be unreliable?

A: I would think they would be unreliable." Carlson Depo., at 295-96.

otherwise discussed his techniques for tire failure analysis.[10] He does identify a number of publications and research papers regarding tests which can be performed to assess the causes of abnormal tread wear and asserts that he relied on such papers in his testimony in this case. Carlson Depo., at 285. These papers do not back his techniques, however, as Carlson does not indicate that he actually performed any of the tests described in this literature on the tire in question; rather, he contends only that he is "probably" relying on the information provided in those documents as "background" for the work that he did. Carlson Depo., at 285, 287. Carlson was able to point to no other publications on which he relied in performing his analysis. Thus, it is evident from Carlson's testimony that there are no papers or publications which specifically address the propriety of the visual inspection method of analyzing failed tires which Carlson employed in this case.

The third *Daubert* factor concerns the known or potential error rate of the technique used. In this case, Carlson testified repeatedly that he did not know the potential error rate of his method for determining whether a given tire failure is the result of abuse or a defect. Carlson Depo. at 281, 284, 311, 474-75. Carlson

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[10] The relevant portion of Carlson's testimony is as follows:

"Q: So you arrive at a conclusion in your tire failure analysis by eliminating other causes?

A: Yes.

Q: Are there any publications that would discuss how you go about doing that sort of tire failure analysis?

A: I don't think so." Carlson Depo., at 303.

believes that differentiation between the two causes involves one's experience, and indicates that he has looked at many tires. Carlson Depo., at 281-84. However, he admits that he does not know whether his previous analyses of failed tires have been correct or incorrect; moreover, there is no evidence that he (or anyone else) has tested his methods in a controlled laboratory setting to gauge their accuracy in correctly distinguishing between overdeflected and defective tire separations. *Id.*

Finally, Carlson's methodology does not pass muster under the fourth prong of the *Daubert* analysis, either. The Court cannot conclude from the record before it that Carlson's analysis is generally accepted in the relevant scientific community. Indeed, the only evidence of general acceptance is Carlson's bare, unsupported statement that other tire experts have testified in depositions that methods similar to those used by Carlson are acceptable means of distinguishing between abused tires and defective tires in tire failure cases.[11] Though the plaintiffs

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[11] The relevant testimony from the deposition is as follows:

"Q: Are there any publications that would discuss how you go about doing that sort of tire failure analysis?

A: I don't think so.

Q: Are there any generally accepted theories on how you go about doing that sort of tire failure analysis?

A: I think this is a generally accepted theory is [sic] to eliminate all the other causes.

Q: And what do you base that statement on?

A: I've read many depositions from tire experts." Carlson Depo., at 303.

claim that the defense tire expert, Thomas Dodson, uses the same method of analysis as that employed by Carlson, the excerpted portions of Dodson's deposition provided by the plaintiffs lend no support to this contention. *See* Exhibit A to Plaintiffs' Opposition to Motion to Exclude Testimony of Dennis Carlson. There is simply no evidentiary basis upon which this Court could conclude that the relevant scientific community accepts a visual-inspection, process-of-elimination analysis of tire failure in the manner that it was performed by Carlson.

Thus, it appears that none of the four admissibility criteria outlined by the *Daubert* court are satisfied in this case. However, the plaintiffs respond by arguing that Carlson's testimony is a mere "technical analysis", rather than scientific evidence, and that such testimony is therefore exempted from *Daubert*-style scrutiny. In support of this argument, plaintiffs point out that Rule 702 of the Federal Rules of Evidence distinguishes between "scientific" and "technical" evidence, while the *Daubert* Court was concerned solely with the "admissibility of purportedly scientific evidence." *Daubert*, 125 L.Ed.2d at 480.

This argument is meritless. While the Supreme Court's ruling in *Daubert* was specifically directed at the admissibility of certain scientific evidence, the plaintiffs have not directed the Court's attention to a single case in which a court has refused to apply *Daubert* to a "technical analysis". On the contrary, the *Daubert* standard has been routinely utilized by lower courts in assessing the admissibility of "technical analyses" similar to that at issue in the present case. *See, e.g., Strickland v. Royal Lubricant Co.*, 911 F.Supp. 1460 (M.D.Ala.1995) (using *Daubert* test to

assess admissibility of mechanical engineer testimony regarding faulty respirator); *Dickerson v. Cushman, Inc.*, 909 F.Supp. 1467, 1472 (M.D.Ala.1995) (mechanical engineer testimony regarding safe design of mobile tanks); *Bowers v. Northern Telecom, Inc.*, 905 F.Supp. 1004 (N.D.Fla.1995) (ergonomist testimony concerning computer keyboard design); *Byrnes v. Honda Motor Co., Ltd.*, 887 F.Supp. 279, 282 (S.D.Fla.1994) (testimony concerning proper safety equipment on motorcycle); *Williamson v. General Motors Corp.*, 1994 WL 660649, n4 (N.D.Ga., Sept. 30, 1994) (mechanical engineer testimony concerning engine drag theory of automobile accident). Thus, the distinction urged upon the Court by plaintiffs has not been recognized by the lower courts in this Circuit.

More to the point, the technical/scientific distinction has been impliedly rejected by the Eleventh Circuit. In *United States v. Lee*, 25 F.3d 997 (11th Cir.1994), the Eleventh Circuit remanded with instructions for the district court to consider whether the results of "specialized, technical diagnostic machinery" comported with *Daubert*. *Id.* at 998. In particular, the *Lee* court held that:

> "[C]ourts do not distinguish between the standards controlling admission of evidence from experts and evidence from machines. . . . *Daubert* applies not only to testimony about scientific concepts but also to testimony about the actual applications of those concepts." *Id.* at 988-99.

The plaintiffs may be correct that Carlson's testimony does not concern a scientific concept per se; however, it certainly is testimony about an application of scientific concepts involved in physics, chemistry, and mechanical

engineering. In other words, Carlson's method is necessarily grounded in some scientific foundation, and *Lee* requires this Court to consider the legitimacy of both the scientific foundation and the actual application of that foundation employed by Carlson. Accordingly, plaintiffs' efforts to recast Carlson's testimony in a "technical" light cannot succeed. The *Daubert* test clearly applies in this case, and plaintiffs' argument to the contrary is specious.

This Court's *Daubert* analysis illustrates that none of the criteria set forth by the Supreme Court for admissibility of scientific evidence under Rule 702 have been satisfied in this case. *See Clement v. Griffin*, 634 So.2d 412, 427 (La.App. 4 Cir.1994) (finding that expert testimony concerning defect in tire was inadmissible under *Daubert*). The *Daubert* Court assigned to trial courts "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 125 L.Ed.2d at 485. The Court has a responsibility to serve as a gatekeeper, ensuring that purportedly expert testimony does not reach a jury unless that testimony is reliable and reasonable. *See id.* As set forth in his deposition, Carlson's testimony is simply too unreliable, too speculative, and too attenuated to the scientific knowledge on which it is based to be of material assistance to the trier of fact; hence, it cannot be accorded the status of admissible expert testimony. Therefore, the Court **GRANTS** the defendants' motion to exclude the testimony of Dennis Carlson pursuant to the test articulated by the Supreme Court in *Daubert*.

4. Plaintiff's Evidence of a Defect

To maintain a claim under the AEMLD, a plaintiff cannot simply prove that an accident occurred and that he was injured; rather, "a defect in the product must be affirmatively shown." *Townsend v. General Motors Corp.*, 642 So.2d 411, 415 (Ala.1994). In the absence of Carlson's testimony, the plaintiffs have offered no evidence whatsoever that the right rear tire on the minivan was defective. Although they repeatedly recite the principle that proof of the specific defect which caused the product to fail is not required, *see Sears Roebuck & Co. v. Haven Hills Farm, Inc.*, 395 So.2d 991, 994 (Ala.1981), the plaintiffs have directed the Court to no other evidence that the tire suffered from any manufacturing or design defect at all. Alabama law is unambiguous that, while no proof of a specific defect which caused the product to fail is necessary, an AEMLD plaintiff must still offer some affirmative evidence of a defect in the product. *See Townsend*, 642 So.2d at 415. This the plaintiffs have not done; therefore, the Court has no choice but to **DISMISS** the plaintiffs' AEMLD claim against the defendants.

B. Plaintiffs' Remaining Claims

1. Negligence/Wantonness Claims

The exclusion of Carlson's testimony effectively bars the plaintiffs from proceeding with their negligence and wantonness causes of action against the defendants. The plaintiffs have offered no admissible evidence whatsoever from which a reasonable fact finder could conclude either that the defendants breached some duty of

care or that any such breach caused the injuries sustained by the plaintiffs; therefore, the negligence cause of action cannot stand against any of the defendants. Likewise, there is no evidence that any of the defendants acted with reckless indifference to consequences, or otherwise acted in a wanton manner with respect to the tire in question. Therefore, the plaintiffs' claims against defendants for negligent and wanton design, manufacture, distribution, marketing, and sale of the tire in question are due to be, and the same hereby are, **DISMISSED.**

2. Breach of Warranty Claims

The plaintiffs' breach of warranty theory of liability is something of a puzzle to the Court. Plaintiffs have never alleged that any of the defendants sold the tire directly to them, nor have they contested the fact that the minivan (including the tire which ultimately failed) was sold to them in used condition by a nonparty used car dealership on an "as is" basis. Given these facts, the Court does not see any factual or legal mechanism through which any of the defendants can be considered to have made any warranty to the plaintiffs. Certainly, there is no evidence that defendants ever sold the tire to the plaintiffs, so as to create an express or implied warranty by a seller to a buyer. Even if there were such a warranty, however, there is no evidence that the tire was not merchantable at the time of sale or that the tire was unfit for any purpose. In short, the Court fails to see how the undisputed facts of this case can possibly lend themselves to a cause of action against the tire manufacturers and distributors for breach of warranty. The parties' joint

pretrial order is of no assistance, either, as it lists as a triable issue only whether "any act or omission of any of the Defendants constitute[d] breach of warranty." *See* Joint Pretrial Order.

The plaintiffs' amorphous, unsupported breach of warranty claim cannot withstand summary judgment scrutiny. Rather, this claim seems to represent just the sort of "shotgun pleading" which recently prompted Chief Judge Tjoflat of the Eleventh Circuit to issue the following admonition:

> "Experience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice." *Anderson v. District Bd of Trustees of Central Fla. Community College*, 77 F.3d 364, 1996 WL 71087, *1 (11th Cir., Feb. 20, 1996).

Given the plaintiffs' failure to express their breach of warranty claim with any modicum of clarity in the pretrial order and their failure to respond in any manner to the defendants' motion for summary judgment as to that claim, the breach of warranty claim cannot proceed any further in this litigation. Therefore, the Court **GRANTS** the defendants' motion for summary judgment on the breach of warranty claim.

IV. Conclusion

For all of the foregoing reasons, the Court hereby **GRANTS** the defendants' motion to exclude the testimony of Dennis Carlson, and **GRANTS** the defendants'

motion for summary judgment as to all causes of action brought by the plaintiffs. The plaintiffs' claims are hereby **DISMISSED** with prejudice.

It is so **ORDERED.**

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Caption Omitted In Printing]

PLAINTIFFS MOTION TO RECONSIDER

COME NOW, the Plaintiffs, by and through their attorneys of record, and do hereby move this Honorable Court under Fed. R. Civ. P. 59(e) to reconsider the issues involved in this case, to alter or amend its judgment, to vacate its order of April 1, 1996, to deny Defendant's Motions to Exclude the Expert Testimony of Plaintiff's expert Dennis Carlson and for Summary Judgment, and to hold an evidentiary hearing under Federal Rules of Evidence 104(a) to determine the admissibility of said testimony. In support of said motion Plaintiffs offer the following:

1.) Plaintiffs have argued that the method and opinions of their expert witness satisfied the requirement of Federal Rules of Evidence 702;

2.) Plaintiffs have argued that the technical analysis applied by their expert witness was appropriate to the inquiry of whether the tire failure made the basis of this action resulted from defect or abuse;

3.) Ample evidence exists to show that the testimony of Plaintiffs' expert witness was admissible under the Rule of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), adopted by this Honorable Court as governing the issue;

4.) This Honorable Court should exercise it [discretion] to admit the testimony of Plaintiffs' expert where

the exclusions of said testimony would be dispositive of the Plaintiff's case, where the admissibility of said testimony may be in question, and where the Court has not yet held an evidentiary hearing under Fed.R.Civ. P. 104(a).

WHEREFORE, these premises considered, Plaintiff do hereby move this Honorable Court to entertain their Motion for Reconsideration, and do hereby submit their Memorandum of Law and Exhibits A-D in support thereof.

Respectfully submitted,
JACKSON, TAYLOR & MARTINO, P.C.
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[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

[Caption Omitted In Printing]

MEMORANDUM OF LAW

IN SUPPORT OF

PLAINTIFF'S MOTION FOR RECONSIDERATION

I. STATEMENT OF FACTS.

II. ISSUES:

(a) Whether The Expert Testimony Of Dennis Carlson Is Admissible Under *Daubert*.

(b) Whether Trial Court Should Exercise Its Discretion To Admit Testimony of Plaintiff's Expert Or To Grant An Evidentiary Hearing Under Fed. R. Evid. 104(a).

III. ARGUMENT:

(a) The Expert Testimony Of Dennis Carlson Should Be Admitted.

(1) The Court Should Reconsider Its Construction Of The *Daubert* Rule.

(A) *Daubert's* Reach Does Not Extend To Mere Technical Inspections.

(B) A Recent Eleventh Circuit Confirms Settled Pre-*Daubert* Law Allowing Trial Courts To Analyze Expert Methodology, But Not The Application Of The Methods Or The Results Obtained.

(C) *Daubert* Requires The Trial Court To Flexibly Seek Criteria By Which To Determine The Reliability Of An Expert's Techniques.

(2) The Court Should Reconsider Its Application Of The *Daubert* Rule.

(A) Carlson Bases His Opinion On The Application Of Reliable Deduction And Testing Procedures.

(B) The Expert's Methodology Is Testable And Refutable.

(C) The Expert's Procedure Has Been Exposed To Peer Review.

(D) The Technique Is Commonly Accepted In The Relevant Scientific Community.

(E) Ample Other Indicia of Reliability Exist By Which To Test The Expert's Methodology.

(b) This Court Should Exercise Its Discretion To Admit Testimony of Plaintiff's Expert, Or To Grant An Evidentiary Hearing Under Fed. R. Evid. 104(a).

IV. CONCLUSION.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

1. STATEMENT OF FACTS.

Plaintiffs adopt the Statement of Facts included in the Court's Order of April 1, 1996, with the following additions:

With discovery closed, Defendants moved the Court to exclude the testimony of Plaintiff's expert Dennis Carlson, to hold an evidentiary hearing to determine the admissibility of the expert's testimony, and to grant summary judgment on all counts

The expert opinion met a three-pronged attack. First, Defendants argued that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) compelled the exclusion. Defendants' Brief (Br.), pp. 18-23. Second, it claimed that the opinion was based on insufficient evidence to support the conclusion that the tire failed due to defect. Br. at 24-27. Finally, it argued that the danger of unfair prejudice and misleading the jury outweighed the probative value of the evidence. Br. at 27-28.

As to the first two arguments, Plaintiffs responded that Carlson's testimony – based on technical inspection rather than scientific reasoning – should not be governed by *Daubert*. Plaintiffs' Brief In Opposition (Opp. Br.), pp. 6-9. Moreover, Carlson relies for his opinion on a physical and visual inspection of the tire itself. Opp. Br. at 9. Using a process of elimination, Carlson first examines the tire for signs that it failed due to abuse. Opp. Br. at 9. If he

fails to find sufficient evidence of abuse, he opines that the failure resulted from defect. Opp. Br. at 9-10. Plaintiffs pointed out that Carlson's procedure was developed from years of experience in the tire industry, and that it was the same one used by Defendants' expert, Thomas Dodson. Opp. Br. at 10. They also noted that Carlson's opinion would enable the jury to determine that the tire failed due to defect, even though the particular nature of that defect was not identified. Opp. Br. at 12-14.

Plaintiffs answered Defendants' third argument by demonstrating that Carlson's testimony was essential to the jury's understanding of the technical aspects of the tire's failure, the technical terminology involved in this inquiry, and the procedures used to design and manufacture tires. Opp. Br. at 12.

In support of their arguments, the parties submitted some 520 pages of deposition transcripts provided by Carlson in this matter. Order, p.6 n.4. They also provided other materials. After review of these documents, this Honorable Court determined that no Rule 104(a) evidentiary hearing would be necessary to examine either the methodology used by Carlson or the basis for his conclusion that the particular tire failed due to defect. *Id.*[1]

In its Order on Defendants' Motion to Exclude Testimony of Plaintiffs' Expert, the Court determined that Carlson's testimony should be excluded under the

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[1] Plaintiffs understand that the Court has already reviewed the complete deposition testimony of their expert. Therefore, for the Court's convenience, only those excerpts upon which Plaintiffs rely are attached hereto as Exhibit "A".

Daubert construction of Federal Rule Of Evidence 702. The Court examined the testimony in light of four criteria set forth by the *Daubert* Court for determining the admissibility of scientific evidence and held that – because it met none of those criteria – it could not be admitted as expert testimony. Order, pp. 14-15.

Having granted Defendants' motion to exclude, the Court determined that Plaintiffs had presented no other evidence of a design or manufacturing defect. Order, pp. 15-16. Summary judgment was granted as to all claims.

II. ISSUES:

The issues presented by this Motion for Reconsideration are twofold:

(a) Whether The Expert Testimony Of Dennis Carlson Is Admissible; and

(b) Whether Trial Court Should Exercise Its Discretion To Admit Testimony of Plaintiffs' Expert Or To Hold An Evidentiary Hearing Under Fed. R. Evid. 104(a)?

III. ARGUMENT:

(a) The Expert Testimony Of Dennis Carlson Should Be Admitted.

(1) The Court Should Reconsider Its Construction Of The *Daubert* Rule.

Plaintiffs ask the Court to review Supreme Court precedent to eliminate three flaws in its decision. First,

Daubert's holding does not extend to mere technical opinions rather than opinions based on novel scientific theories. Second, even if *Daubert* governs, it does not require or permit a trial court to ensure the reliability of an expert's tests or conclusions. Third, the Supreme Court requires a flexible inquiry involving not only the four criteria examined in this case, but any others able to satisfy the Federal Rules' preference for admission of expert testimony.

(A) *Daubert's* Reach Does Not Extend To Mere Technical Inspections.

Plaintiffs reiterate their argument that the *Daubert* analysis should not be applied to technical opinions based on physical inspection of empirical evidence. *"Daubert's* narrow focus is on the admissibility of 'novel scientific evidence' under Fed. R. Evid. 702." *E.g., Edwards v. Atro S.p.A.*, 891 F.Supp. 1074, 1083) (E.D.N.C. 1995). The case was intended to address problems posed by "junk science," not professional opinions of qualified experts. *See Iacobelli Const., Inc. v. County of Monroe,* 32 F.3d 19, 25 (9th Cir. 1994). It should not be used to proscribe expert testimony based on facts, an investigation, and traditional technical/mechanical expertise," so long as the opinions are supported by rational explanations which reasonable men might accept, and so long as his methodology is not "novel or extreme." *Lappe v. American Honda Motor Co., Inc.*, 857 F.Supp. 222, 228 (N.D.N.Y. 1994).

Plaintiffs argued this point in their original Brief, and request the Court to reexamine the merits of this argument.

(B) A Recent Eleventh Circuit Circuit Confirms Settled Pre-*Daubert* Law Allowing Trial Courts To Analyze Expert Methodology, But Not The Application Of The Methods Or The Results Obtained.

Second, the Court appears to hold that *Daubert* requires trial court examination of the reliability of expert testimony, including both the underlying scientific theories and the testing applying those theories. Order, pp. 13-14. Were that the case, the court would be required to judge the reliability of the expert's test results, and the credibility of the opinions based on those results. It is fundamental, however, that the jury must decide whether the expert's opinion is to be trusted.

The Eleventh Circuit recently restricted the scope of post-*Daubert* Rule 702 inquiries. In *Joiner v. General Electric Company*, the trial court had held testimony inadmissible because it believed the studies upon which the experts relied "simply [did] not support the experts' position." 78 F.3d 524, 533 (11th Cir. 1996); Exhibit A. Based on this ruling, and based on the consequent absence of any issue of material fact, the District Court for the Northern District of Georgia granted summary judgment. *Id.* at 528). Recognizing that the Federal Rules employ a liberal approach to admissibility *(id.* at 529), that the judge must leave questions of credibility to the jury *(id.* at 529, 533), and that the experts' opinions addressed a factual issue *(id.* at 533, 534), the Eleventh Circuit reversed.[2]

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[2] *Joiner's* restriction of *Daubert* inquiries focused on the proper scope of the analysis. However, the Eleventh Circuit took advantage of its first opportunity to construe *Daubert* to lend

Although Joiner is the first post-*Daubert* case to reverse a lower court for improperly finding expert testimony inadmissible, it was not the first case to do so. *In Hewitt v. B.F. Goodrich Co.*, another case involving expert testimony on the cause of tire failure, the issue was whether the bead bundle in a tire was damaged by abuse or in manufacturing, and the only evidence on the question was provided by expert testimony. 732 F.2d 1554, 1558 (11th Cir. 1984). The trial court determined that the plaintiff's expert witness' testimony was "tenuous' and suspect," and that the jury's verdict for the plaintiff is not supported by any credible evidence and flies in the face of the great weight of the evidence to the contrary." *Id.* at 1555-56. The court therefore granted the defendant's motion for a new trial. *Id.* at 1555. The Eleventh Circuit found that the trial court had abused its discretion by weighing the credibility of the expert:

> The trial judge may have considered that Goodrich's experts were more credible than Mr. Bice, however, that is not his role. The new trial was granted on the basis of the trial judge's finding of credibility. . . . The trial judge must see to it that only properly qualified experts present their opinions to the jury and that the rules of evidence are followed. When the resolution of the case boils down to credibility, the trial judge must allow the jury to function. In this case, the usual deference to the factfinders on issues us of

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guidance on the proper criteria for determining evidentiary reliability (78 F.3d at 529) and to caution that *Daubert* was intended to lessen the burden on those seeking to submit expert testimony in keeping with the "liberal thrust" of the Federal Rules of Evidence *(id.* a 529-30).

> credibility requires us to defer to the jury and not to the judge. . . . The issue was very simple although the technical testimony may have been complex and the evidence was certainly contested. Thus, it is appropriate to defer to the jury as factfinder. *Id.* At 1558.

Thus, even if *Daubert* governs technical examinations, it does not require the Court to exclude questionable results of valid testing procedures. The Court is not to decide whether the tests were properly performed, or whether opinions based on test results were credible or valid. It is only to determine that "the predicate principles and methodology relied upon by the experts are valid and that they *can be applied* to the facts at issue." *Joiner v. General Electric Co.*, 78 F.2d 524 (11th Cir., 1996) (Birch, J., specially concurring) (emphasis added); and *see, cf*, Margaret A. Berger, *Evidentiary Framework, Reference Manual On Scientific Evidence* (Fed. Judicial Ctr. 1994) 71 (focus must be solely on principles and methodology, not on conclusions of expert).

The court never determines whether the principles have been applied to the observed facts properly, it is only to be certain that they *can be* so applied. If the Defendants wish to disprove the expert's opinion, they may do so by cross-examination, contrary test results, or their own experts. *See Joiner*, 78 F.2d 524 ("Opinions of any kind are derived from individual pieces of evidence [which] are the building blocks of a perfectly reasonable conclusion, one reliable enough to be submitted to a jury along with the tests and criticisms cross-examination and contrary evidence would supply.").

The Court should reconsider its decision to be certain that it has not decided whether the opinions are reliable, but only whether the methodology purportedly used to reach the opinion is reliable. *See, e.g., id.* (Citing *Daubert*, 113 S.Ct. At 2797)

The following section will demonstrate that the method used by Plaintiffs' expert was developed by years of experience in the tire industry, that it scientifically applies empirical test data to a process of elimination to reach its conclusions, that it mirrors the procedure followed by the opposing expert, and that it has has been exposed to extensive peer review. The methodology used is reliable. If the Court feels that the tests were improperly applied, the results suspect, or the conclusions invalid, the testimony should be subjected to the fire of contrary evidence and cross-examination. *E.g., Joiner* (Birch, J., concurring) ("Whether the conclusions advanced from the stated premises in fact follow and the persuasiveness of those conclusions in the ultimate resolution of competing opinions, are questions appropriately left to the finder of fact.").

(C) *Daubert* Requires The Trial Court To Flexibly Seek Criteria By Which To Determine The Reliability Of An Expert's Techniques.

Finally, Plaintiffs ask the Court to review its construction of *Daubert* so as to apply appropriate tests by which to determine the reliability of the methodology underlying expert testimony. The Court's paradigm was expressed as follows:

> In assessing whether proffered scientific testimony is admissible, a court *must* consider such factors as: (1) whether the technique or theory used may be tested or refuted; (2) whether the technique or theory has been the subject of peer review or publication; (3) the known or potential rate of error of a technique; and (4) the degree of acceptance of a theory or technique within the relevant scientific community. (Emphasis added) Order, p. 9.

The Court then applied each of these tests, concluding that "none of the [four] criteria set forth by the Supreme Court for admissibility of scientific evidence under Rule 702 have been satisfied in this case." Order, p. 14.

This construction of *Daubert* is flawed in two ways. First, the trial court need not perform any specific test in its *Daubert* examination. All that is required is that the court determine whether the proposed testimony is based on a reliable foundation:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. . . . Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate.

> Ordinarily, a key question to, be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified."
>
> * * *
>
> Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a sine qua non of admissibility, it does not necessarily correlate with reliability.
>
> * * *
>
> Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error.
>
> * * *
>
> Finaily, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community."
>
> * * *
>
> The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity – and thus the evidentiary reliability – of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions they generate.

(Citations omitted) *Daubert*, 125 L. Ed.2d at 482-484.

The short list of criteria supplied by the Supreme Court is not to be deemed exhaustive. Berger, *supra*, at 71. The trial court will always consider those criteria necessary to determine the reliability of proposed testimony; those criteria will *normally* include one or more of the four described by this Court. However, an opinion may be admissible even where it fails all four of the typical tests.

This Court's Order appears to read the Supreme Court's suggested tests as mandatory. Such a construction would be erroneous, and would establish an overly restrictive and misleading precedent for litigants, counsel, and other courts.

Second, although the cited criteria are typical or ordinarily applicable to a Daubert inquiry, they are not exclusive. The "overarching subject [of the analysis] is the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission." *Id.* At 484. In footnote 12 to its decision, the *Daubert* Court cited four sources for additional factors that could be considered in evaluating the reliability of proffered expert testimony. Those sources described nineteen additional criteria for admissibility, including, *inter alia*:

(1) The expert's qualifications or stature in the field;

(2) The expert's willingness to discuss uncertainties in the techniques used to prepare the evidence and in the conclusions;

(3) The clarity and simplicity with which the technique at issue can be described and its results explained;

(4) The extent to which the basic data are verifiable by the court and jury;

(5) The availability of other experts to test and evaluate the technique at issue;

(6) The probative significance of the expert's evidence in the circumstances of the case. *See* Margaret S. Woodruff, *The Judge As Gatekeeper*, in *1996 Wiley Expert Witness Update* 15-17 (John Wiley & Sons, Inc. 1996).

As the ensuing discussion shows, this Court may well have found Carlson's testimony admissible had it considered these six criteria. However, neither the four factors used by this Court nor the additional sources referenced in *Daubert*'s footnote 12 provide an exhaustive list. Because the inquiry envisioned by Rule 702 is a flexible one, the trial court must flexibly seek the appropriate criteria.

This Court restricted its analysis to the four suggested tests, and changed the Supreme Court's guiding language into a command. Doing so, it converted *Daubert's* flexible inquiry into a rigid one. Thus, the construction suggests that a second error of law guided the Court's Judgment.

(2) The Court Should Reconsider Its Application Of The *Daubert* Rule.

(A) Carlson Bases His Opinion On The Application Of Reliable Deduction And Testing Procedures.

Plaintiffs also ask the Court to reapply the *Daubert* criteria and to examine its conclusions of law in this case. The Court has already reviewed the entire deposition of Dennis Carlson. Order, p.6 n.4. The following excerpts demonstrate that his testimony is admissible under Rule 702 as interpreted by *Daubert*.

The evidence before the Court showed that Carlson employs a "scientific technique" to determine the cause of tire failure. Starting from the premise that a tire must fail either due to abuse or defect (Carlson, p. 392), he inspects the tire for four specific indicia of abuse:

Q How would you isolate in tire failure analysis the – to a particular potential cause of loss of adhesion, how do you do that?

A Okay, the first step is to eliminate the causes of abuse, I mean the factors of abuse. There are usually indicators on the tire that show when a tire has been abused.

* * *

Q And what evidence is significant to you in going through that process?

What in particular are you looking for?

A Well, in separations you look at the wear pattern, the sidewall and the bead groove. In a nutshell.

* * *

Q What type of wear patterns would you expect to see where the longterm separation is caused by the abuse?

A Well, the simple answer is, you know, the shoulder wear is more severe than the center wear.

* * *

Q You also mentioned that it would be sidewall evidence?

A That's correct.

Q And what particular evidence would you look for on the sidewall?

A I would look for the deterioration on either the outside or the inner-liner that you can see. You can see discolorations, you can see a change in the texture, you can see outright deterioration of the tire.

Q And you also mentioned that there would be evidence in the bead groove area of the tire. What would you look for there?

A Well, to see if there is a bead groove on both beads. Carlson, pp. 248-252.

Carlson also opined that rim flange impressions can also provide a somewhat flawed indicator of abuse. Carlson, p. 391.

Carlson concludes that a tire is defective only if he finds that insufficient evidence exists to blame the failure on abuse:

A A tire will fail because it is a bad tire or it's been abused, If you find the abuse factors, then it's not a bad tire.

Q And if you don't find the abuse factors or the evidence on the abuse factors is inconclusive, then what do you do?

A Well then it's probably a bad tire.

Q Probably a bad tire?

A Yes. And you got to look and see. Carlson, pp. 402-03.

Carlson subjected the tire to a visual and tactile review:

Q And then on the black-wall side of the tire, is the shoulder worn more than the center?

A No, it's about the same.

Q Have you measured it?

A Yes, I have.

Q Do you have notes of those measurements?

A Somewhere in there, I guess.

Q Could you find those for me, please, sir?

A I think you can see in pictures $2^{27}/_{28}$ and $2^{29}/_{30}$, show measurements of approximately $^{3}/_{32}$ in both places.

* * *

Q Were these your measurements or were these measurements taken by Mr. Edwards?

A I believe these were taken by Mr. Edwards but I did it also.

Q When did you do it?

A I guess the first time I saw it.

Q Which would have been last March 7th, shortly before your deposition?

A Yes.

Q Do you have any notes of your measurements?

A Just verifying what was in the photographs, I have a sheet here where I prepared summary and it has those measures.

* * *

Q Did you measure the black wall to the side shoulder at several different points?

A I recall that I did.

Q And do you recall what your measurements were?

A No.

Q Did you make any measurements on the shoulder area on the whitewall side where you said it was worn? Did you make any measurements of what the tread depth was there?

A It varied from 3/32 to zero.

* * *

Q Are there any circumferential variations in the remaining tread depth present in the center of the tire or do you know?

A It's very even. Carlson, pp. 406-10.

Carlson made his own measurements, some of which were discussed in deposition. In addition, he relied in part for his conclusions upon earlier measurements taken by his associate, Mr. George Edwards. Carlson's own measurements supported the earlier findings of Mr. Edwards.

Based upon years of experience in the tire design and testing industry, he opined from his and his associate's visual and tactile inspections of the tire that insufficient indicators of abuse existed to explain the tire's failure, and that therefore the tire must have failed due to defect. Carlson, *e.g.*, pp. 323-325; Affidavit, Exhibit B.

The measurements were objective, as were the professional considerations given those measurements and the general condition of the tire.

Q I guess then it all comes down to the subjective opinion of whoever is doing the tire failure analysis as to whether those factors of abuse you've listed – the wear pattern, the sidewall damage, the bead grooves, and rim flange impressions – exist in a given tire?

A Well, it's subjective if you have the knowledge and experience to analyze those factors. Carlson, pp. 402-403.[3]

In short, Carlson bases his inspection on the theory that a tire will fail from either from abuse or original defect, that if it suffers from abuse certain telltale signs will be present, and that therefore, if such signs are absent the tire failed from defect. To determine how a particular tire failed, he inspects the tire for signs of abuse, including wear pattern, sidewall damage, the bead grooves, and rim flange impressions. In this case, examination of the tire revealed insufficient indicia of abuse, and Carlson's experience in analyzing such factors led him to the conclusion that defect had caused the failure.

(B) The Expert's Methodology Is Testable And Refutable.

This Court concluded that Carlson's methodology met none of the four tests outlined by the *Daubert* Court. Reconsideration will show that the testimony was admissible because it was based on refutable techniques which were subject to peer review and were widely accepted in

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[3] Although Mr. Carlson uses the term "subjective" here to describe his method of evaluation, Plaintiffs ask the Court to consider the context of the word. It is clear that he merely means to indicate that there is a certain amount of subjectivity in the evaluation of the concrete factors observed, as is always the case. A Rule 401 evidentiary hearing would be highly useful to the Court in determining whether and how Carlson's opinions derive from his observations.

the relevant scientific community. In addition, the testimony was admissible because it met the six criteria listed *supra* page _____. This Court found that "Carlson's method for analyzing the tire is not susceptible to testing or falsification." Order, p. 10. It is clear, however, that the premises underlying Carlson's reasoning are subject to testing: Must a tire fail by defect if not by abuse? May failure by defect be determined by the absence of indicia of abuse? May the empirical evidence cited as evidence of abuse or defect be observed by the jury? May the data on which the expert's calculations are based be examined for accuracy? Where the premises, empirical data, and logical method may be easily understood and examined by opposing experts, opposing counsel, and jurors, the methodology underlying the opinion is testable and refutable.

(C) The Expert's Procedure Has Been Exposed To Peer Review.

This Court also determined that because no publications specifically address the propriety of Carlson's procedure, It fails to meet the second prong of the inquiry. That second prong asks "whether the theory or technique has been subjected to peer review and publication." *Daubert,* 125 L.Ed.2d at 483. However, "[p]ublication (which is but one element of peer review) is not a sine qua non of admissibility; it does not necessarily correlate with reliability." *Id.*

The conclusion that Carlson's methodology had not been subjected to peer review because it had not been published ignores the fact that scholarship "is but one

form of peer review." Peer review takes place wherever a technique is judged by professionals – in school, under the eye of critical supervisors, and in the debate between co-workers or competitors. Carlson's methodology was developed and exposed to daily scrutiny during years of experience in testing for Michelin. It has more lately been exposed to extensive peer review, not in the quiet pages of scholarly journals, but in the fire of litigation.

(D) The Technique Is Commonly Accepted In The Relevant Scientific Community.

Likewise, as to the fourth criterion: Plaintiffs argued in Brief that Defendants' expert, Thomas Dodson, used exactly the same procedure for determining whether a tire had failed due to abuse or defect. The attached Affidavit of Plaintiffs' co-counsel (Exhibit C) cites pages of Dodson's deposition testimony inadvertently deleted by Plaintiffs. Excerpted portions of the referenced pages demonstrate that Defendants' expert follows the same procedure (a visual, non-destructive examination of the tire performed the same day that the opinion is rendered) and checks for the same indicia of abuse (accelerated shoulder wear, sidewall deterioration, and bead groove depression):

Q Did you do any – well, let me ask you this, when you had the tires to examine them, what did you do?

A Conducted a visual nondestructive examination.

Q Did you take some pictures?

A Yes, sir.

• • •

Q You visually inspected the tires: You made these pictures. What else?

A As it relates to these tires, that's it.

Q How long did you view or review the tires?

A On two separate occasions, probably three or four hours the first time and then I had the tires at our facility for a day subsequent to that time. I spent the majority of the day with the tire.

Q All right. I have been provided with your report.

• • •

A As far as rendering an opinion to them about what happened to the tire, I did that the day I examined the tires back in May of 1994.

• • •

Q Could I see the notes –

A Oh, sure.

Q – you are referring to?

A No problem at all.

Q These measurements that are on here, were they performed in Mobile?

A Yes, sir.

Q And where did you take those measurements?

A At [Defense counsel's] offices.

Q Is that where the tires were?

A Yes, sir.

Q And what type of measurement did you use to measure the tread depth?

A A tread depth measuring device.

• • •

Q This is dated May 26th of 1994, and I will get a copy of this later on. Was it at that time that you discussed with them what your opinion was or was it later?

A It was the same day, but subsequent to the taking of the notes and examination of the tires.

Q All right. And was your opinion on that date any different than what has been referenced as your opinion in this December 11, 1995 letter, which is Plaintiffs' Exhibit 3?

A No. Dodson Depo., pp. 53-58.

Dodson went to the offices of Defendants' attorneys, visually examined the tire, and concluded the same day that it had failed due to abuse. He used a "tread depth measuring device" to take his measurements, just as Carlson's measurements were based on micrometer readings. See, *e.g.* Carlson, pp. 408-409. Dodson's deposition testimony indicates that the opinions he derived from his tests are set forth in his report of December 11, 1995. That report shows that he selected the same indicia used by Carlson in deciding whether the tire failed from abuse:

> During my examination of the subject tire, I noted several conditions indicative of abusive overdeflected operation including vary severe bead compression grooves, bluish discoloration of the rubber due to oil migration, accelerated tread shoulder rib wear, and an abraded puncture hole which had been patched. Bare polyester body cords indicated intracarcass pressurization in the tire structure.

> I found no defects in the subject tire that caused or contributed to its unserviceability. It was no longer serviceable due to prolonged overdeflected operation with intracarcass pressurization. Exhibit D, p. 2.

Both Carlson and Dodson based their opinions on visual and tactile examination, on tread measurements, and on other concrete observations. Both agreed that the cause of failure could be determined from the presence or absence of the same factors.

The fact that Carlson's method has been adopted by his opponent shows both that it has been exposed to peer review and that it is generally accepted in the relevant scientific community.[4]

(D) Ample Indicia of Reliability Exist By Which To Test The Expert's Methodology.

Plaintiffs ask the Court to reconsider its findings that Carlson's testimony was not testable, had not been subjected to peer review, and was not accepted in the relevant scientific community in light of the foregoing considerations. In addition, Plaintiffs believe that the Court should consider the six factors listed supra pages 10-11 which, taken together, strongly indicate that Carlson's opinions should be admitted. Carlson and Edwards are highly qualified and respected in the field. Carlson is

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[4] George Edwards, a nationally-renowned expert in the field, has over 50 years' experience in tire analysis, and uses the same methodology as Carlson. Mr. Dodson is employed by Smithers Scientific Services, Inc., a corporate tire failure analysis firm for decades.

willing to discuss uncertainties in his technique. The technique can be clearly explained, and its results compared. The data, based on simple gauge readings, photographs, and physical observation, may be verified by the Court and the jury. Witnesses such as Defense expert Dodson are available to test and evaluate the technique. Most important, Carlson's testimony is highly probative, and this Court has already determined that absent its admission Plaintiffs will have no recovery for the loss of their daughter.

Because Carlson's opinions are refutable; because his techniques have been subjected to extensive peer review and are commonly accepted in the relevant scientific community; because his techniques can be easily explained and evaluated, his empirical observations verified, and his opinions challenged; and because his highly-probative testimony is necessary for this case to go forward, Plaintiffs ask this Honorable Court to reconsider its original decision to avoid any potential errors in its conclusions of law.

(b) This Court Should Exercise Its Discretion To Admit Testimony of Plaintiffs' Expert, Or To Grant An Evidentiary Hearing Under Fed. R. Evid. 104(a).

Questions of admissibility are committed to the broad discretion of the trial court. *E.g., Walker v. Nations Bank of Florida, N.A.*, 53 F.3d 1548, 1554 (11th Cir. 1995); *cf., Elkins v. Mathis Funeral Home, Inc.*; 996 F.2d 266, 288 (11th Cir. 1993); *see also, U.S. v. Beasley*, 1996 WL 4297 (11th Cir.) (exclusion of expert testimony subject to abuse

of discretion standard of review); *accord, U.S. v. Cameron*, 907 F.2d 1051, 1061 (11th Cir. 1990); *Balogh's of Coral Gables, Inc. v. Getz*, 778 F.2d 649 (11th Cir. 1985). However, *"because the Federal Rules of Evidence governing expert testimony display a preference for admissibility,"* a particularly stringent standard of review is applied to exclusion of expert testimony. *Joiner*, 78 F.3d 524, 529.

Moreover, when the trial court is uncertain, it should resolve all doubts in favor of admission. *See, e.g., id.* (regarding Rules' preference for admission). The Court should admit relevant expert testimony without which the jury will not be able to determine a fact essential to the case. *See Busby v. City of Orlando*, 9311 F.2d 764, 784 (11th Cir. 1991) (trial court should have admitted relevant expert testimony without which jury could not determine damages). Moreover, the Court should admit expert testimony unless it finds that the testimony could not possibly assist the jury's understanding. *See U.S. v. Mitchell*, 954 F.2d 663, 665-66 (11th Cir. 1992); *Busby v. City of Orlando*, 931 F.2d 764, 784 (11th Cir. 1991)

This Court has determined that Carlson's opinion raises an issue of material fact sufficient to support Plaintiffs' *prima facie* case. Order, p. 8 n.7. It also has found that if that opinion is inadmissible, Plaintiffs will be barred by summary judgment. Order, pp 14-16.

Equity begs this Honorable Court to exercise its discretion in favor of admission for three reasons.

First, it is by no means certain both that Carlson's testimony is subject to *Daubert* and that it meets none of the criteria established in that case. At least some doubt

remains as to its admissibility, and such doubts must be resolved in favor of admission.

Second, the Court has determined that Plaintiffs' entire *prima facie* case hangs on the admission of this testimony. Carlson raises the sole triable issue in this dispute, an issue which will be decided only if he speaks. The Court should let him be heard if there is any reasonable chance that he can help the jury to decide whether the tire failed due to defect or abuse.

Finally, Plaintiffs suffered a devastating loss due to the sudden and explosive failure of a tire marketed by Defendants. They retained an expert who advised them that the tire failed due to a manufacturing or design defect, and they filed suit in October, 1993. Litigation spanned three years and three courtrooms, state and federal. Discovery required extensive motion practice and repeated travel to Ohio, Washington, and California. Whether or not Carlson's testimony is finally admitted, Plaintiffs should not be barred from trial after so prolonged a journey without at least an evidentiary hearing.

IV. Conclusion.

The expert testimony of Dennis Carlson should be admitted. The Court should reconsider its construction of *Daubert*, which appears to be based on three errors of law. *Daubert* was not intended to govern this sort of technical analysis; if *Daubert* applies, the Court is to examine the reliability of Carlson's methodology, but must not weigh the credibility of the test results the conclusions based thereon; the Supreme Court did not require the trial

Court to select the four criteria applied in this case, and a Rule 702 inquiry requires flexibly application of other criteria which might prove the expert's technique reliable.

The Court should reconsider its *Daubert* inquiry for four errors in its conclusions of law. Carlson's methodology is testable and refutable by opposing counsel and experts, by the Court, and by the jury. The procedure has been subjected to peer review. The technique has been adopted by the relevant scientific community, including Defendants' own expert. Numerous other factors combine to demonstrate that the testing procedure is reliable.

Finally, Carlson's opinion may be admissible, its admission is essential to the case, and equitable considerations encourage the Court to bring this case to trial. Therefore, this Court should exercise its broad discretion either to allow his expert testimony or to order an evidentiary hearing.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

PATRICK CARMICHAEL, etc., et al.,	*	CIVIL ACTION NUMBER:
Plaintiffs	*	93-0860-CB-S
versus	*	
SAMYANG TIRES, INC., et al.	*	
Defendants.	*	

RESPONSE OF DEFENDANTS TO PLAINTIFFS' MOTION TO RECONSIDER

* * *

1. DAUBERT APPLIES TO THE EXPERT TESTIMONY OF DENNIS CARLSON

The plaintiffs' first argument in support of their Motion to Reconsider is that the *Daubert* analysis should not be applied to the plaintiffs' proffered expert testimony because it is "technical" rather than "scientific" and Daubert applies only to field of expertise involving science. In its Order of April 1, the Court rejected this argument as specious, citing numerous cases applying *Daubert* in assessing the admissibility of "technical analyses" similar to that at issue in the present case. (p. 13-14). The Court also recognized that tire failure analysis involves scientific concepts involved in physics, chemistry, and mechanical engineering. (p. 14).

* * *

Indeed, in support of their motion to reconsider, the plaintiffs argue that Carlson's method "scientifically applies empirical test data . . . to reach its conclusions." (p. 7 of plaintiffs' motion to reconsider). Plaintiffs themselves thus admit Carlson's techniques are in the field of "science". Plaintiffs' first argument is due to be dismissed.

2. THE COURT PROPERLY APPLIED THE DAUBERT ANALYSIS TO THE METHODOLOGY EMPLOYED BY DENNIS CARLSON

The plaintiffs' second argument is that the Court erred in performing its *Daubert* role of gatekeeper by analyzing Carlson's conclusions rather than the reliability of Carlson's methodology purportedly used to reach these conclusions. The Court's opinion clearly demonstrates, however, that the Court properly carried out its responsibilities under Daubert. The Court considered in detail the reasoning and methodology used by Carlson and, based on the record before it, determined they were not reliable.

Specifically, the Court determined that the plaintiffs simply did not carry their burden of proving that the expert's findings were based on any reliable methodology. The Court defined Carlson's purported methodology as follows:

> In order to determine whether a defect has caused the tire failure, Carlson looks for the following signs of overdeflection: (1) greater tread wear on the shoulder than in the center of

> the tire; (2) sidewall deterioration or discoloration; (3) abnormal bead grooving on the tire; and (4) rim flange impressions. Carlson Depo. at 250-52, 390. When Carlson fails to find sufficient evidence of two of these four indicators in a tire, he rules out overdeflection as a cause of tire failure and, barring other evidence of abuse, concludes that the loss of adhesion was prompted by a manufacturing or design defect. Carlson Depo. at 278-79. As Carlson testified, "when we look for the indicators of overloading or overdeflection, as I see, and eliminate those as a possible cause, then there is nothing else but a manufacturing defect." Carlson Depo. at 278.

(p.7).

The Court then proceeded to evaluate the reliability of Carlson's purported methodology in detail. In doing so, the Court made numerous specific findings, including, *inter alia*, that (1) Carlson's initial observation of the tire occurred after Carlson had issued his written report and conclusions regarding the cause of the blowout; (2) Carlson examined the failed tire for the first time on the morning that his deposition was taken and performed no tests on any of the minivan's other tires at that time; (3) his analysis was limited to a visual inspection of the tire, though he conceded such actions as cutting the tire could reveal additional pertinent information; (4) Carlson indicated that the separation most likely began under a bald spot on the tire, where the tread was completely worn; (5) Carlson did not identify any affirmative evidence of a defect in the tire; (6) Carlson admitted that his method was "subjective" and that there was "uncertainty" in his conclusions; (7) Carlson could not identify any specific

tests or other procedures which could be used to corroborate or refute his conclusions; (8) Carlson stated that he did not think there were any chemical tests which he could have applied to this tire; (9) Carlson testified that if he did not find sufficient (in his subjective opinion) evidence of abuse or if the evidence of abuse is inclusive, he concludes there was a manufacturing defect; (10) Carlson conceded that there were no publications or papers – much less any that had been subject to "peer review" or that were "generally accepted" in the relevant scientific community – which approved or otherwise discussed his methodology for tire failure analysis;[5] (11) Carlson did not know the known or potential error rate of his methodology; (12) Carlson stated that he did not know whether his previous analysis of failed tires was correct or incorrect; (13) the record did not establish that Carlson's methodology was generally accepted in the relevant scientific community; and (14) Carlson based the reliability of his methodology on having read the depositions of other experts in other lawsuits.[6]

The Court's April 1 Order held that Carlson's method was not scientific or otherwise reliable. The Court excluded his conclusions on this basis. This decision was

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[5] As stated above, if Carlson's visual inspection does not reveal at least two (2) indicators of abuse, he presumes that the tire failure was due to a manufacturing defect even though there is no affirmative evidence of such a defect.

[6] One of the criteria considered by the Ninth Circuit on remand of *Daubert* from the Supreme Court was whether the expert's methodology and resulting opinions had their origin in the laboratory or the courtroom. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 43 F.2d 1311, 1317 (9th Cir. 1995).

founded on the Court's consideration of all the evidence in the record and consideration of the suggested *Daubert* factors and numerous other facts. The plaintiffs' argument that the Court failed to focus on the reliability of Carlson's methodology is therefore meritless.

3. THE COURT DID NOT ERRONEOUSLY RESTRICT ITS EVALUATION OF THE RELIABILITY CARLSON'S METHODOLOGY

The plaintiffs' third argument is that the Court considered only the four factors enumerated in *Daubert*, thereby overly restricting the analysis. The fact that the plaintiffs failed to carry their burden regarding any of the four suggested criteria does make the Court's consideration of those criteria inappropriate. If the plaintiffs had met any of the four suggested criteria, it is doubtful that the plaintiffs would be arguing that application of the criteria which were met was error.

Moreover, plaintiffs did not suggest before the April 1 order any other criteria for the Court to consider. Plaintiffs seem to forget that they had the burden of establishing the admissibility of their proffered expert testimony. In light of the Court's specific findings listed above in defendants' discussion of plaintiffs' second argument, it is clear that the Court considered the entire record before it and based its Order on numerous findings including the four criteria suggested in *Daubert*. Thus, plaintiffs' third argument is unavailing.

4. ADDITIONAL FACTORS RAISED BY PLAINTIFFS

The plaintiffs now request that the Court review the admissibility of Carlson's testimony under additional factors beyond those specifically listed in *Daubert*. Plaintiffs' first additional factor is that Edwards and Carlson are highly qualified in the field of tire failure analysis. This argument begs the question. Under *Daubert*, an opinion is not admissible solely because a scientist or engineer utters it; an opinion becomes admissible because it is scientific or otherwise reliable.

In addition, Edwards has not been identified by the plaintiffs as an expert witness in this case and any reference to Edwards is due to be stricken.[7] Regarding Carlson, the defendants have strenuously disputed his qualifications as an expert in the field of tire failure analysis. As discussed above, the Court found that Carlson conceded his knowledge of tire failure analysis was based on having read depositions of experts. The Court, however, did not base its exclusion of Carlson's opinions on his lack of qualifications, but rather on the admitted subjectivity and unreliability of his method of analysis.[8]

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[7] Defendants file simultaneously herewith a motion to strike the affidavit of Edwards submitted by plaintiffs in support of their motion to reconsider and any reference to Edwards in said motion.

[8] The Court "assume[d] (without deciding) for the purposes of this [April 1] order that Carlson was qualified to offer expert testimony on this subject [tire failure]." Order at p. 6.

The plaintiffs also assert that Carlson's testimony should be admitted because his methodology is easily explained. Such a criterion as "ease of explanation" adds nothing to the proper focus of a court's application of *Daubert*: the reliability of the method used. A method easy to explain may be totally unreliable; and vice versa. For example, an expert's method might be "My first impression is always right." While this method is easy to explain, it would be ludicrous to consider it reliable or scientific.

Even if this additional factor were relevant, applied in this case it does not overcome the failure of plaintiffs to establish that Carlson's methodology was reliable, and the fact that the record compelled a finding that it was unreliable. The reliability of Carlson's method of concluding a manufacturing defect absent at least two (2) indicators of abuse is wholly unsupported. As the Court found, even Carlson conceded that his method was subjective and uncertain. Carlson's analysis in this case was speculative and conclusory, not scientific or otherwise reliable.

• • •

This Court's Order of April 1, 1996, in the present case properly focused on the methodology employed by Carlson and concluded that Carlson's testimony as too unreliable, speculative, and attenuated to be accorded the

status of admissible expert testimony. Plaintiffs' motion to reconsider is due to be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PATRICK CARMICHAEL, et al., Plaintiffs,	)	CIVIL ACTION NO. 93-0860-CB-S
v.	)	
SAMYANG TIRES, INC., et al., Defendants.	)	

ORDER

This matter is before the court on the plaintiffs' motion to reconsider the Court's April 1, 1996 order granting summary judgment to the defendants (tab 142). The Court hereby **GRANTS** the motion to reconsider; however, for the reasons set forth below, the court **AFFIRMS** its previous ruling.

On April 1, 1996, the Court granted the defendants' motion for summary judgment and dismissed this action with prejudice. In so doing, the Court declared the testimony of plaintiffs' expert Dennis Carlson ("Carlson") inadmissible under Rule 702 of the Federal Rules of Evidence, as interpreted by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993). Because Carlson's testimony constituted the plaintiffs' sole evidence that the tire in question suffered from a manufacturing or design defect, the court granted the defendants' motion for summary judgment as to plaintiffs' Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), negligence, and wantonness causes

of action. The plaintiffs have asked the Court to reconsider this decision.

In their motion, the plaintiffs contend that the Court erred in the following four respects: (1) by applying a *Daubert* analysis to a mere "technical inspection" which is not scientific evidence; (2) by improperly evaluating the credibility and reliability of the results of Carlson's analysis, rather than his methodology; (3) by improperly narrowing the *Daubert* inquiry to consider only the four factors enumerated by the *Daubert* Court; and (4) by ruling that the *Daubert* criteria for admissibility were not satisfied in this case. The first of these arguments was considered and rejected by the Court in its previous order, and the plaintiffs have offered the Court no basis for reconsidering it at this time. The Court remains of the opinion that the weight of the authority is clear that the *Daubert* inquiry is in fact applicable to testimony such as that offered by Carlson. However, the plaintiffs' second, third, and fourth arguments in support of their motion merit further discussion, and will be addressed in turn.

A. Whether the Court Improperly Evaluated the Reliability of Carlson's Results

In their brief, the plaintiffs correctly point out that a court's focus in a *Daubert* inquiry must be on the reliability of the underlying principles and methodology employed by an expert, rather than on the credibility of that expert's results. *See Daubert*, 125 L.Ed.2d at 485 (trial courts must ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand"); *Joiner v. General Electric Co.*, 78 F.3d 524, 530 (11th

Cir. 1996) (cautioning lower courts to be careful not to "cross the line" between evaluating reliability of expert's methodology and disagreeing with expert's conclusions).

In light of the *Daubert* and *Joiner* holdings, the plaintiffs ask the Court to reexamine its ruling to determine whether it excluded Carlson's testimony based on the reliability of his results, rather than on the reliability of his methodology. The plaintiffs' concern is unfounded, as the Court's April 1, 1996 order in no way passed judgment on the validity of Carlson's conclusions. Rather, the Court, acting in its *Daubert*-imposed "gatekeeper" role, found the methodological foundation of Carlson's testimony to be lacking, and excluded his testimony on that basis, in accordance with Rule 702. Hence, the plaintiffs' assertion that the court improperly "crossed the line", in violation of *Joiner*'s admonition to the contrary, is devoid of merit.

B. Whether the Court Improperly Limited the Scope of the Daubert Inquiry

The plaintiffs next contend that the Court erred by considering only the four factors specifically enumerated by the Supreme court in *Daubert*.[1] The plaintiffs are correct that the Court's inquiry focused on the four

[1] In support of this argument, plaintiffs point out that a *Daubert* footnote listed several sources which advance a multitude of other criteria which may be utilized in assessing the reliability of proffered expert testimony. *See Daubert*, 125 L.Ed.2d at 484 n.12. Plaintiffs have selected six factors set forth in one of these sources, and now argue that said criteria militate in favor of a finding of the reliability of Carlson's methods and, hence, the admissibility of his results. However, these six factors

reliability indicia identified by the Supreme Court in *Daubert*. Likewise, it is true that the *Daubert* Court stressed that the relevant inquiry should be "flexible" and that its "overarching subject [should be] the scientific validity" and reliability of an expert's methodology. *Daubert*, 125 L.Ed.2d at 484. Indeed, the list of criteria propounded in *Daubert* was intended neither to be exhaustive nor to apply in every case. *See Joiner*, 78 F.3d at 530.

However, the Eleventh Circuit has noted that, "[w]here appropriate, [the four factors identified in *Daubert*] serve as indicia of the reliability of the basis of an expert's testimony." *Id.* In this case, application of the *Daubert* factors did operate to gauge the reliability of Carlson's methods, and all of these factors indicated that his testimony was properly excluded. The Court's analysis revealed no countervailing factors operating in favor of admissibility which could outweigh those identified in *Daubert*, and the parties identified no such factors in their briefs. Contrary to plaintiffs' assertions, the Court did not convert the flexible *Daubert* inquiry into a rigid one; rather, the Court simply found the *Daubert* factors appropriate, analyzed them, and discerned no competing criteria sufficiently strong to outweigh them. As such, the Court's analysis complied with both the letter and spirit

are of dubious merit, as the *Daubert* Court expressly declined the opportunity to express approval or disapproval of the reliability criteria upon which plaintiffs rely by stating that "all these versions [of the reliability inquiry] may well have merit, although we express no opinion regarding any of their particular details." *Id.*

of *Daubert*. Accordingly, this ground for reconsideration lacks merit.

C. *Whether the Court Improperly Evaluated the Daubert Factors*

Finally, the plaintiffs assert that several of the *Daubert* factors should have been found to work in favor of admissibility rather than against it. Specifically, the plaintiffs contend that, contrary to the Court's findings, Carlson's methodology is testable and refutable, is subject to peer review, and is commonly accepted in the relevant scientific community.[2] In its previous order, the Court provided a detailed justification for its finding that Carlson's results were neither testable nor refutable. Plaintiffs have not provided this Court with any reason to disturb its finding on the "testability" front, and the Court declines their open-ended invitation to do so.

Regarding the "peer review" criterion, plaintiffs concede that Carlson's methodology has not been the subject of publications or other conventional forms of peer review; nonetheless, they submit that his methods have been exposed to extensive review "in the fire of litigation". However, the fire of litigation is not an atmosphere which is conducive to careful, well-reasoned, scholarly analysis, critique, and review of the scientific underpinnings of expert testimony. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995)

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[2] Apparently, the plaintiffs do not dispute the Court's finding that the fourth *Daubert* criterion, the known or potential rate of error, operates against admissibility in this case.

("we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office"). Additionally, the Court notes that similar tire-failure testimony has not fared well in such an atmosphere. *See Diviero v. Uniroyal Goodrich Tire Co.*, ___ F.Supp. ___, 1996 WL 146446 (D. Ariz., March 25, 1996) (excluding tire failure testimony under *Daubert*); *Clement v. Griffin*, 634 So.2d 412, 426-27 (La. App. 4th Cir. 1994) (same). The Court remains of the opinion that the subject of Carlson's testimony has not been exposed to rigorous scientific peer review procedures, and that the reliability of his methods is therefore attenuated.

Finally, the plaintiffs have presented evidence which purports to show that Carlson's techniques and methodology are "commonly accepted" in the relevant scientific community. Specifically, they offer an excerpted deposition transcript in which the defendants' expert testified that he also utilized a visual-inspection method of analyzing the tire at issue in this case, and that he took pictures and used a tread-depth measuring gauge in his work. Plaintiffs contend that this testimony reveals that the methodology and principles adopted by Carlson are widely accepted in the relevant community. The Court declines to make such a leap. The cited testimony indicates only that both experts adopted the basic techniques of collecting data. It says nothing about the component of Carlson's tire failure analysis which most concerned the Court, namely, the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis. There is no evidence whatsoever that the parties' experts agree on the proper analytical framework to be employed in assessing

data obtained from a visual inspection of a tire. Accordingly, this additional testimony does not alter the Court's previous findings as to this factor.

Although the plaintiffs make a powerful appeal to equity, it remains eminently clear that Carlson's testimony lacks sufficient indicia of reliability to be admissible under *Daubert* and Rule 702 of the Federal Rules of Evidence. Additionally, the plaintiffs argue that the Court should not have rejected Carlson's testimony until after conducting an evidentiary hearing in this matter. However, no hearing was necessary, as the Court carefully combed the hundreds of pages of deposition transcripts submitted by the parties before ruling on the admissibility of Carlson's testimony, and the plaintiffs have not alleged that any information material to the Court's inquiry was missing from those documents.

D. Conclusion

For all of the foregoing reasons, the Court hereby **GRANTS** the plaintiffs' motion for reconsideration. Upon reconsideration, however, the Court **AFFIRMS** its order of April 1, 1996, which order declared Carlson's testimony inadmissible and dismissed the plaintiffs' claims with prejudice.

It is so **ORDERED.**

DONE this the 5th day of June, 1996.

/s/ Charles R. Butler, Jr.
CHIEF DISTRICT JUDGE

Patrick CARMICHAEL, Sr., an individual, father and next of kin to Patrick Carmichael, Jr., a minor; Luzviminda Carmichael, an individual, mother and next friend of Carina Horn, a minor and administratrix of estates of Janice Horn; Carina Horn, a minor; Leona Carmichael, Shameela Carmichael, Natimah Carmichael, Plaintiffs-Appellants,

v.

SAMYANG TIRE, INC.; Hercules Tire Company; Kuhmo, U.S.A.; Kumho & Company, Inc., Defendants-Appellees,

Cooper Rubber and Tire Company, Ford Motor Company, Defendants.

No. 96-6650.

United States Court of Appeals,
Eleventh Circuit.

Dec. 23, 1997.

Appeal from the United States District Court for the Southern District of Alabama.

Before BIRCH and CARNES, Circuit Judges, and PROPST*, Senior District Judge.

BIRCH, Circuit Judge:

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* Honorable Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

In this appeal, we determine whether the Supreme Court's *Daubert*[1] criteria for admission of scientific evidence should apply to testimony from a tire failure expert. In granting summary judgment against plaintiff-appellants, the district court relied on *Daubert* to exclude testimony from plaintiff-appellants' expert. Plaintiff-appellants, however, argue that the district court should not have applied *Daubert* because their expert's proffered testimony is not "scientific." We REVERSE.

I. BACKGROUND

On July 6, 1993, plaintiff-appellants, eight members of the Carmichael family (collectively "the Carmichaels"), were involved in a serious automobile mishap when the right rear tire on their minivan failed. This occurrence resulted in significant trauma to each of the Carmichaels; one member of the family ultimately died from her injuries. For the purposes of this appeal, the parties agree that the failure of a tire manufactured and sold by defendant-appellees (collectively "Samyang") directly caused the mishap.

Following the incident, the Carmichaels submitted the carcass of the failed tire to George Edwards, a purported expert on tire failure. After examining the tire, Edwards determined that its failure was not the result of any abuse by the Carmichaels. Therefore, Edwards concluded that a defect in either the tire's design or its manufacture caused the blowout. Before Edwards could

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[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

be deposed by Samyang, however, he became too ill to testify and transferred the case to his employee, Dennis Carlson.[2] After reviewing Edwards's file on the tire and discussing the case with Edwards, Carlson confirmed Edwards's conclusion that a design or manufacturing defect caused the blowout. Carlson, though, did not personally examine the tire until approximately one hour before his deposition by Samyang, long after he had rendered his opinion on the cause of the blowout. In his deposition, Carlson then set forth both his analytical process and his conclusion that the Carmichaels' tire was defective.

Before the district court, Samyang moved for the exclusion of Carlson's testimony on the ground that it could not satisfy *Daubert's* standards for reliability of scientific evidence. After reviewing Carlson's deposition, the district court agreed and excluded Carlson, writing that "none of the four admissibility criteria outlined by the *Daubert* court are satisfied in this case." *Carmichael*,

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[2] Carlson holds a bachelor's and a master's degree in mechanical engineering from the Georgia Institute of Technology. Carlson worked from 1977 to 1987 as a research engineer for Michelin Americas Research & Development, where he was involved for the majority of his tenure in tire testing. Following that experience, Carlson became a senior project engineer at S.E.A., Inc., where he served from 1987 to 1994 as a tire failure consultant before becoming an employee of George R. Edwards, Inc. The District Court assumed for the purpose of its *Daubert* analysis that Carlson is qualified to testify as an expert in tire failure analysis. *See Carmichael v. Samyang Tires, Inc.*, 923 F.Supp. 1514, 1518-19 (S.D.Ala.1996). We, like the district court, assume that Carlson is an expert for the purposes of this appeal.

923 F.Supp. at 1521. Because the Carmichaels' only proffered evidence of a tire defect was Carlson's testimony, the district court then granted summary judgment for Samyang. *See id.* at 1524. The Carmichaels now appeal the exclusion of their tire expert.

II. DISCUSSION

In *Daubert*, the Supreme Court established several general criteria for the admission of scientific expert testimony under Federal Rule of Evidence 702.[3] *See Daubert*, 509 U.S. at 593-95, 113 S.Ct. at 2796-98.[4] Appealing the district court's exclusion of Carlson's testimony, the Carmichaels argue that the district court should not have applied *Daubert's* reliability framework because Carlson is not a "scientific" expert. In response, Samyang contends that Carlson's testimony is based on an unreliable

[3] Rule 702 provides that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[4] The Court suggested four primary inquiries for determining the reliability of a scientific theory or technique: (1) whether it has been tested; (2) whether it has been subject to peer review and publication; (3) its known or potential rate of error; and (4) whether it is generally accepted by the relevant scientific community. However, the Court emphasized that "[t]he inquiry envisioned by Rule 702 is . . . a flexible one. Its overarching subject is the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission." *Daubert*, 509 U.S. at 594-95, 113 S.Ct. at 2797.

scientific analysis. We review the district court's legal decision to apply *Daubert de novo*, *see Compton v. Subaru of Am., Inc.*, 82 F.3d 1513, 1517 (10th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 611, 136 L.Ed.2d 536 (1996), and its decision to exclude particular evidence under *Daubert* for abuse of discretion, *see General Elec. Co. v. Joiner*, ___ U.S. ___, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

Despite Samyang's protestations, "Daubert does not create a special analysis for answering questions about the admissibility of all expert testimony. Instead, it provides a method for evaluating the reliability of witnesses who claim scientific expertise." *United States v. Sinclair*, 74 F.3d 753, 757 (7th Cir.1996). In fact, the Supreme Court in *Daubert* explicitly limited its holding to cover only the "scientific context." *Daubert*, 509 U.S. at 590 n. 8, 113 S.Ct. at 2795 n. 8; *see also United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir.1997) ("*Daubert* applies only to the admission of scientific testimony."); *Compton*, 82 F.3d at 1518 (same); *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir.1994) (same).[5] Although the Court's analysis in *Daubert* may suggest reliability issues for district courts

[5] Samyang's citations to *United States v. Lee*, 25 F.3d 997, 999 (11th Cir.1994) (per curiam), for the contrary position are inapposite. In *Lee*, we examined whether a district court should apply *Daubert's* reliability factors to evidence produced by machines. *Id.* at 998. Because the results produced by the machines were "only admissible through the testimony of an expert witness," and because "courts do not distinguish between the standards controlling admission of evidence from experts and evidence from machines," we remanded for reconsideration in light of *Daubert*. *Id.* at 998-99. Nowhere in *Lee* did we imply that *Daubert* applied to non-scientific expert testimony.

to consider as they determine whether proffered evidence is sufficiently reliable for admission under Rule 702, "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system: 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' " *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir.1996) (quoting *Daubert*, 509 U.S. at 596, 113 S.Ct. at 2798).

What, then, is the difference between scientific and non-scientific expert testimony? In short, a scientific expert is an expert who relies on the application of scientific principles, rather than on skill- or experience-based observation, for the basis of his opinion. *See Daubert*, 509 U.S. at 590, 113 S.Ct. at 2795. As the Sixth Circuit explained in *Berry v. City of Detroit*:

> The distinction between scientific and non-scientific expert testimony is a critical one. By way of illustration, if one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.
>
> On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.

25 F.3d 1342, 1349-50 (6th Cir.1994); *see also Sorenson v. Robert B. Miller & Assoc., Inc.*, Nos. 95-5085, 95-5086, 1996 WL 515351, (applying Berry).[6] Thus, the question in this case is whether Carlson's testimony is based on his application of scientific principles or theories (which we should submit to a *Daubert* analysis) or on his utilization of personal experience and skill with failed tires (which we would usually expect a district court to allow a jury to evaluate). In other words, is the testimony at issue in this case more like that of a beekeeper applying his experience with bees or that of an aeronautical engineer applying his more generalized knowledge of the scientific principles of flight?

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[6] An analogy closer to the facts of this case would be the example of an auto mechanic and a burned-out spark plug discussed at oral argument. Given a proper foundation, a mechanic with years of experience with spark plugs might be able to identify for a jury burns or other marks on a spark plug that he believes disclose whether the plug burned out because of normal wear or some defect; an experienced mechanic may recognize patterns of normal and abnormal wear on an auto part even though he has no knowledge of the general principles of physics or chemistry that might explain why or how a spark plug works. Such a mechanic's testimony would be non-scientific, while the testimony of another expert on the nature and effects of combustion (applied to spark plugs) would be scientific.

Having clarified the question posed by this case, it seems apparent to us that Carlson's testimony is non-scientific. Although Samyang is no doubt correct that the laws of physics and chemistry are implicated in the failure of the Carmichaels' tire, Carlson makes no pretense of basing his opinion on any scientific theory of physics or chemistry.[7] Instead, Carlson rests his opinion on his experience in analyzing failed tires. After years of looking at the mangled carcasses of blown-out tires, Carlson claims that he can identify telltale markings revealing whether a tire failed because of abuse or defect.[8] Like a beekeeper who claims to have learned through years of observation that his charges always take flight into the wind, Carlson maintains that his experiences in analyzing tires have taught him what "bead grooves" and "sidewall deterioration" indicate as to the cause of a tire's failure. Indeed, Carlson asserts no knowledge of the physics or chemistry that might explain why the Carmichaels' tire failed. Thus, we conclude that Carlson's testimony falls outside the scope of *Daubert* and that the district court erred as a matter of law by applying *Daubert* in this case.

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[7] If Carlson or the Carmichaels' counsel were to assert or imply a "scientific" basis for Carlson's testimony at trial, after representing to the district court and to this court that Carlson's opinions are "non-scientific," then we are confident that the district court will be able to take appropriate remedial measures.

[8] We note that both Carlson's and Samyang's experts rely on the same markings on the Carmichaels' tire for their analyses; the existence and relevance of these signs has not been questioned by either party before this court.

Still, the inapplicability of *Daubert* should not end the day regarding Carlson's reliability. Under Rule 702, it is the district court's duty to determine if Carlson's testimony is sufficiently reliable and relevant to assist a jury. *See 14.38 Acres*, 80 F.3d at 1078. Moreover, Carlson's testimony is subject to exclusion under Federal Rule of Evidence 403 if its probative value is substantially outweighed by its likely prejudicial effect.[9] Aside from its *Daubert* related arguments, Samyang has presented this court with a number of potentially troubling criticisms of Carlson's alleged expertise and methodology, including his rendering of an opinion regarding the Carmichaels' tire before he had personally inspected its carcass.[10] We leave judgments about such matters to the discretion of the district court on remand.

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[9] After analyzing Carlson's proffered testimony under *Daubert*, the district court concluded that "Carlson's testimony is simply too unreliable, too speculative, and too attenuated to the scientific knowledge on which it is based to be of material assistance to the trier of fact. . . ." *See Carmichael*, 923 F.Supp. at 1522. Even without requiring Carlson's testimony to satisfy the *Daubert* criteria on remand, the district court still may find that, under all the circumstances, Carlson's testimony is so unreliable as to be unhelpful to a jury. We do not intend our comments regarding Carlson's testimony or qualifications to constrain the district court's discretion to admit or exclude his testimony under the proper Rule 702 or Rule 403 standards.

[10] We note that many of Samyang's criticisms of Carlson may also apply to the qualification of Samyang's own tire failure expert. However, we leave such issues for the district court to consider on remand.

III. CONCLUSION

The district court erred as a matter of law in applying the *Daubert* criteria to the Carmichaels' proffered expert testimony. Therefore, we REVERSE and REMAND the case to the district court for further proceedings consistent with this opinion.